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WASHINGTON REPORTS

VOL. 63

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

APRIL 5, 1911—JUNE 27, 1911

ARTHUR REMINGTON
REPORTER

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ERRATA

Page 372, syllabus, second line from bottom, for lessor read lessee

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Page 364, line 8 from bottom, for appropriation read a proportion
Page 364, line 9 from bottom, end of line, strike out an

RULES OF THE SUPREME COURT

ADOPTED DECEMBER 9, 1911.

RULE IX., Subd. 6.

(6) In all criminal appeals where the defendant is in custody and is unable to give bail, the judge of the superior court from which the appeal emanates shall file a certificate, and the cause will be advanced to the head of the docket and be heard on the first day of the succeeding term of the court, or as soon thereafter as counsel can be heard.

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 9085. Department Two. April 5, 1911.]

A. P. BURWELL, *Appellant*, v. V. HUGO SMITH, *Respondent*.[1]

VENDOR AND PURCHASER—TITLE—LIS PENDENS—PARTIES TO SUIT—COMMENCEMENT OF ACTION. A *lis pendens* notice does not constitute a lien upon property, entitling the purchaser to rescind the sale, where a prior title was deraigned through a grantee not a party to the action, and it was not shown that the action had been commenced when the notice of *lis pendens* was filed.

LIS PENDENS—NOTICE—COMMENCEMENT OF ACTION. A *lis pendens* to be effective must be filed in compliance with Rem. & Bal. Code, § 243, requiring that the complaint be filed at or before the filing of the notice.

LIS PENDENS—NOTICE—PARTIES TO SUIT. Rem. & Bal. Code, § 243, providing that subsequent purchasers shall be bound by notice of *lis pendens*, applies only to purchasers from parties to the action.

Appeal from a judgment of the superior court for King county, Kauffman, J., entered March 25, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Reeves Aylmore, Jr., for appellant, contended that the purchaser could rescind for any defect appearing on the face of the abstract. *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217; *Boas v. Farrington*, 85 Cal. 535, 24 Pac. 787; *Taylor v. Wil-*

[1]Reported in 114 Pac. 876.

liams, 2 Colo. 559, 31 Pac. 504; *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. 213. Any *lis pendens* is *prima facie* evidence of an unmarketable title. *Moulton v. Kolodzik*, 97 Minn. 423, 107 N. W. 154. The title was not marketable. *Fagan v. Hook*, 134 Iowa 381, 105 N. W. 155, 111 N. W. 981; *Cummings v. Dolan*, 52 Wash. 496, 100 Pac. 989, 132 Am. St. 986; *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506.

G. E. Steiner, for respondent.

Crow, J.—This action was commenced by A. P. Burwell against V. Hugo Smith, to recover $500 earnest money paid on a contract to purchase real estate. From a judgment of dismissal, the plaintiff has appealed.

On January 15, 1906, respondent, V. Hugo Smith, executed and delivered to appellant, A. P. Burwell, the following written receipt:

"Seattle, Wash., Jan. 15, 1906.

"Received of A. P. Burwell the sum of three hundred ($300) dollars account purchase lot seventeen (17) block four hundred nine (409) Seattle Tide Lands, to be conveyed free and clear of all liens and incumbrances excepting the lien of Seattle & Lake Washington Waterway Co., for filling said lands. Purchase price, thirty-seven hundred fifty ($3,750) dollars; the balance, thirty-four hundred fifty ($3,450) dollars to be paid as follows: Nine hundred fifty dollars ($950) thirty (30) days after date; twelve hundred fifty dollars ($1,250) on or before one (1) year, and twelve hundred fifty dollars on or before two (2) years, with interest from date at the rate of six (6) per cent per annum until paid. The said Burwell shall be furnished a complete abstract showing good and sufficient title to said property and allowed five (5) days for examination thereof; whereupon he agrees to complete the purchase in the manner and upon the terms herein; and in case of his failure so to do, the said sum hereby receipted for shall be forfeited as liquidated damages. It is further agreed that in the event of failure to convey good and sufficient title within thirty (30) days from date, said three hundred ($300) dollars shall be refunded.

"Subject to approval of owner. V. Hugo Smith."

On February 14, 1906, in consideration of the further sum of $200 paid by appellant, the agreement was extended to March 15, 1906. Appellant contends that the respondent furnished an abstract which disclosed a *lis pendens* notice recorded on January 19, 1906, by the relator's attorney in a certain cause wherein the Washington Dredging and Improvement Company, a corporation, was relator, and E. W. Ross, state commissioner of public lands, was respondent; that the notice stated the action mentioned was instituted to obtain a writ of mandamus to compel a conveyance of the land here involved; that it was a cloud upon the title which, upon demand, respondent refused to remove; that the abstract did not show a marketable title such as appellant was obliged to accept, and that he is entitled to recover the earnest money advanced. The trial court, after finding the execution and delivery of the receipt, further found:

"That thereafter, pursuant to said agreement, and on or about the 22d day of January, 1906, the defendant delivered to the plaintiff an abstract of title to said lot for examination; that on or about the 1st day of March, 1906, the plaintiff returned said abstract to the defendant and called the defendant's attention to an unsatisfied judgment against C. B. Bussell, appearing in said abstract as a lien on said lot; that no other objection to said abstract or title was urged by plaintiff; that if any mention was made of the *lis pendens* appearing on page 29 of said abstract (said abstract being plaintiff's exhibit 'D' herein) it was not made the basis of an objection to said abstract or title; that said *lis pendens* did not, and does not, constitute a lien or incumbrance upon said lot; that the defendant then took said abstract from the plaintiff for the purpose of continuation to show the satisfaction of said judgment; that said abstract was so continued and returned to the plaintiff; that after showing the satisfaction of said judgment said abstract showed a good and sufficient title to said lot, free from incumbrance, in full compliance with said earnest money receipt.

"That the plaintiff failed and refused to complete said purchase within the time specified in said contract, or within the time specified in the continuation thereof, or at all."

The appellant insists that these findings were not sustained by the evidence; but after a careful examination of the entire record, we conclude that they must be approved. The evidence, although conflicting, is sufficient to show that the appellant objected to the judgment lien only, but took no exception to the *lis pendens* notice. In any event, we think the trial judge was correct in his conclusion that the *lis pendens* did not constitute any lien or cloud. The abstract shows that two prior *lis pendens* notices, filed in other and previous actions on behalf of the same plaintiff and affecting the same land, had been canceled by an order of the superior court of King county, afterwards affirmed by this court; that thereafter, and prior to the recording of the *lis pendens* notice now under consideration, the state of Washington, by its deed executed and delivered, had conveyed its title to a grantee not a party to the action upon which the present *lis pendens* notice assumes to be predicated. The title respondent was about to tender appellant was to be deraigned from this same grantee, whose title had been acquired prior to the filing of the notice. No evidence was offered to show that the action mentioned in the notice had been commenced, or that service of process had been made therein. Rem. & Bal. Code, § 243, provides that in an action affecting title to real estate the plaintiff, at the time of filing the complaint or at any time thereafter, may file with the county auditor a *lis pendens* notice. In order that an instrument in the form of a *lis pendens* notice shall be notice in law, it must be filed in the auditor's office at or after the time of the commencement of the action. The record fails to show that any complaint was filed, at or before or after the time the alleged *lis pendens* was filed for record. Section 243 further provides that every person to whom conveyance is subsequently executed shall be deemed a subsequent purchaser and shall be bound by all the proceedings taken in the action after the filing of the notice. This, however, applies only to conveyances taken from parties to the suit. *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345;

Noyes v. Crawford, 118 Iowa 15, 91 N. W. 799, 96 Am. St. 363; *Merrill v. Wright*, 65 Neb. 794, 91 N. W. 697, 101 Am. St. 645; 2 Pomeroy, Equity Jurisprudence (2d ed.), § 637.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

[No. 9009. Department Two. April 5, 1911.]

JAMES SPACKMAN *et al.*, *Appellants*, v. CHARLES F. WEBB *et al.*, *Respondents*, THE STATE OF WASHINGTON, *Intervener and Appellant*.[1]

DEEDS — VALIDITY — MENTAL CAPACITY — EVIDENCE — SUFFICIENCY. Deeds and a bill of sale disposing of all the grantor's property during his last illness, and in view of approaching death, will not be set aside at the suit of persons as to whom there was no more than a bare possibility of heirship, and there was only the most meager testimony of mental incapacity on the part of the grantor, consisting principally of statements attributed to the physician that he was in a "dying condition," witnesses testified to his competency, and the witnesses to the deed were not called.

ESCHEAT — WANT OF HEIRS — EVIDENCE — SUFFICIENCY. The state cannot claim an escheat merely because parties failed to show that they were heirs of the deceased.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered February 11, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for cancellation. Affirmed.

Frank H. Foster, *G. W. Sampson*, and *P. D. Smith*, for appellants.

G. V. Alexander and *W. E. Grant*, for respondents.

W. P. Bell, *Attorney General*, for intervener.

[1]Reported in 114 Pac. 877.

CHADWICK, J.—More than twenty years ago, John Speckman went to what is now Okanogan county, and settled on a tract of land about six miles from the present town of Loomis. Later, when the land was surveyed, he made formal filing, and thereafter secured a patent. His life in the community differed in no degree from that of the ordinary American pioneer. He raised a few cattle and cultivated some ground for hay and garden. At one time he had a mail contract, and carried the mail on one of the star routes then, and perhaps now, serving the isolated settlements. When filing upon his land, he gave his name as John Speckman. He claimed that he was a citizen of the United States, born in Pennsylvania. He signed his mail contract in the same way, and so far as the record shows, did all his business and signed such documents as became incident to his limited range of business activity, in the same way. Mr. Speckman was a man of ordinary intelligence, but slow and close of speech. He was not given to confidences, and was extremely reticent, if not wholly disinclined to speak of his past or of his family. A few witnesses testified to such disclosures, but in almost all of such instances such information as he volunteered was in answer to direct questions put by others. From these disconnected statements, it appears that Speckman was brought up in Pennsylvania, where as a boy he was employed in the coal mines; that he was familiar with at least one or two of the cities and towns in Pennsylvania; that he probably went to sea for a time, and was in the state of Arkansas for a season; that he had worked on railroads, including the Canadian Pacific, from which he had drifted into Okanogan county.

The testimony further shows that he had some knowledge of, and was able to converse in, the dialect known as Pennsylvania Dutch. In Speckman's later years he was afflicted with heart disease, and about April 6, 1906, went to a hospital conducted by respondents Webb, at Loomis, for treatment. He died June 20, 1906. A few days before his

death, he disposed of his property, amounting in value to four or five thousand dollars. He deeded his ranch and made over his personal property to Dr. Webb, after giving some of his stock to one Gibson and some to Mrs. Farrens, who says she was engaged to marry Speckman. He died without known heirs, and several witnesses were produced who testified that he had frequently said that he had no "folks" that he knew of. Two or three witnesses testified that, when apparently mindful of his broken health, he had spoken to them about making over his property to some one who would give him a good home and care for him during the remainder of his life. One of these witnesses was asked whether he thought Dr. Webb was a proper person to receive such donation, and to another he said that he was going to or had made his property over to Dr. Webb.

After his death, the appellants appeared, claiming that one Robert Spackman, a cooper by trade, had emigrated from England and settled in Canada, having, among other children, two sons, Lorenzo and Alfred John. Lorenzo, after a time spent in one of the eastern states, settled in Dayton, Washington, and Alfred John, who it is claimed was known as John and was considered the black sheep of the family, ran away from home when a boy. One Schull, a freighter, who had formerly lived at Dayton and seems to have borne some relationship to Lorenzo Spackman's family, met Speckman in the year 1903. He says he was struck by the similarity of the name, and what he claims to be a strong resemblance to Lorenzo Spackman, and that he wrote to his friends at Dayton of the fact that Speckman might be the lost brother Alfred John.

It is likely that Lorenzo Spackman wrote to John Speckman, but the evidence is more certain that, if he did so, the letter was never answered. Schull admits that John Speckman did not admit the relationship, nor did Lorenzo Spackman ever go to see him or pursue the inquiry further. Mrs. Farrens swears that Speckman told her he was born in

Canada, and could find his relations if he wanted to; and the witness Gibson says Speckman had said his father was a cooper. It is also claimed that Alfred John Spackman had his shoulder broken when a boy, and there is some slight evidence to show that Speckman had spoken of a broken collar bone, an injury received when a boy. The testimony of appellants shows that the injury was promptly treated by a surgeon, while the testimony relied on to confirm this incident shows that Speckman stated that he was working for an uncle and, being fearful of his wrath, did not discover the injury to him, but allowed the hurt to heal without salve or physic. A photograph of Lorenzo Spackman, now deceased, was introduced, and some one or two witnesses claimed to detect a similarity or resemblance between Lorenzo Spackman and John Speckman. A letter was submitted to a witness who claimed to be an expert in handwriting, who compared it with the admitted writing of John Speckman, and expressed the opinion that the letter was probably written by John Speckman. We cannot weigh the evidence, so far as it depends upon photographs and exhibits, inasmuch as they are not made a part of the record. Upon these main facts, and others of less weight, the claim of appellants to the heirship of John Speckman rests.

It is contended that the instruments conveying the property to respondents should be set aside, as having been taken at a time when John Speckman was incompetent by reason of his sickness and approaching dissolution, and in fraud of the rights of appellants. After the testimony had been taken, the state intervened, claiming that the evidence shows that John Speckman died without heirs, and joined in the prayer of the respondents that the conveyances to Dr. Webb be set aside, and further that the property be escheated to the common school fund. From a decree denying appellants' heirship and affirming and upholding the conveyances to Dr. Webb, this appeal is taken. The state also appeals from the refusal of the court to set aside the deed and bill

of sale of the personal property, and its refusal to find that John Speckman died without heirs.

In our judgment the weight of evidence sustains the decree. No more than a bare possibility of heirship was shown by the appellants, and the testimony relied upon to show mental incapacity on the part of the grantor is of a most meager character, consisting principally of statements attributed to Dr. Webb that Speckman had been "dying for a week"; that he had "kept him alive the last three or four days with drugs." But there is no evidence even tending to show that he was unconscious more than twenty-four hours before his death, while the notary who took his acknowledgment testified that he was in full possession of his faculties so far as he could see. Both Mrs. Farrens and Gibson agree that he was competent when he made over property to them. Nor does it appear that the witnesses to the deed were even called to testify as to his condition. From the whole record we are convinced that John Speckman was, at the time he conveyed his property to Dr. Webb, mindful of his purpose, and while sick unto death, was mentally competent to understand the nature and character of his act.

It does not follow that, because the appellants have failed to show that they are the heirs of Speckman, he died without heirs; or if he did, being competent to dispose of his property in his lifetime, the state has no ground upon which to claim escheat. No one now before the court having shown an interest in the property of John Speckman sufficient to challenge his disposition of his property, the decree of the lower court will be affirmed.

Many cases have been cited tending to sustain the theories of the respective parties. A review of these cases would be useless, in the light of our finding that neither appellants nor the state has demonstrated an interest sufficient to maintain an action, and that John Speckman was *sui juris* at the time of the execution of the deed and bills of sale which appellants and the intervener seek to set aside. We have stated the

case in passing perhaps more strongly than a strict construction of the testimony would warrant, and to some extent have said what we assume the exhibits and depositions would show if they were before us; and while a motion was interposed before the hearing of this case, asking that the appeal be dismissed because of the insufficiency of the record, we have felt, because of its unusual interest, it would be better to dispose of the case on the merits.

Affirmed.

DUNBAR, C. J., MORRIS, and CROW, JJ., concur.

[No. 9102. Department Two. April 5, 1911.]

K. W. SHAFFORD, *Respondent*, v. WHITE BLUFFS LAND AND IRRIGATION COMPANY *et al.*, *Appellants*.[1]

WATERS AND WATER COURSES — IRRIGATION COMPANIES — REGULATIONS. The obligations of an irrigation company in the arid district are *quasi* public, and arbitrary action in the guise of regulations will not be tolerated.

SAME—REASONABLENESS OF REGULATIONS. A regulation of an irrigation company providing for an intermittent rather than a constant flow of water cannot be declared unreasonable as a matter of law.

SAME—WATER CONTRACTS — REGULATIONS — CUSTOM — EFFECT. A water contract permitting an irrigation company to adopt reasonable rules and regulations, is not controlled by a custom in that locality to supply water in a constant rather than an intermittent flow, since the same depends on the irrigator's necessities and beneficial use.

SAME. A contract giving an irrigation company the right to make reasonable rules and regulations, where the water was furnished by pumping, cannot be controlled by the prevailing custom among users of a natural flow, so long as the company supplied the amount contracted for.

SAME—WATER CONTRACTS—MUTUALITY — CONSTRUCTION. A water contract providing for a certain amount of water per second of time for each 160 acres of land, subject to reasonable rules and regulations of the company as to the time and manner of delivery, is mutual

[1]Reported in 114 Pac. 883.

and to be construed in the light of the necessities of the parties, rather than their arbitrary desires; and a regulation providing for an intermittent flow is not unreasonable, as a matter of law, unless it did not give the amount contracted for.

Appeal from a judgment of the superior court for Benton county, Holcomb, J., entered May 4, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages and equitable relief. Modified.

Parker & Richards, for appellants.

Roberts & Udell, for respondent.

CHADWICK, J.—Plaintiff took an assignment of a contract for the purchase of a tract of land, which contract had been executed by appellant White Bluffs Land & Irrigation Company. A payment was made on the purchase price, and annual payments were to be made thereafter until the full purchase price had been paid. The contract also called for the payment of an annual water rent. Respondent attempted to cultivate his land in 1908 and in 1909, but contends that his crops withered and died for the want of sufficient water to sustain them. He did not pay his water rents or meet his payments for the years mentioned, and as it is alleged, defendants have threatened to cancel his contract. This action was brought, asking for such remedy as would protect plaintiff in his rights as a contract holder, for the appointment of a receiver, that his damages for the years 1908 and 1909 be measured, that the amount thereof be credited upon his contract, and for such other relief as the equities of the case might show that he is entitled to. After a trial on the merits, a decree was entered, assessing plaintiff's damages in the sum of $50, which was ordered applied as a credit upon his contract, but denying his application for a receiver.

A somewhat voluminous record is presented, but we take it that the facts are not very material to the real inquiry. If so, we are inclined to follow the judgment of the trial judge,

and permit his assessment of damages to stand, upon the theory that the defendants did not furnish enough water to mature his crops, although it is equally plain that respondent made but slight effort to use the water that was furnished. He frankly admits that, when he found out how the water was to be furnished, he set about to make a contest and "to see if this contract could be construed that they could dictate to us that we could have water when they gave it. That was my object." The case really turns upon the construction to be given to the following clause in the contract:

"The water company may at its option place and maintain at the point of delivery suitable measuring boxes or gates; the time and manner of delivering, measuring and regulating the supply to the purchaser shall be prescribed by the water company and shall be under its control and subject to such rules and regulations as it may from time to time adopt. The water company may shut off water in its pipes or canals at any time that it may deem necessary to do so for the purpose of repairs; and the purchaser for himself and his heirs and assigns agrees to waive and hereby does waive any and all claims for damages resulting either from an insufficient or excessive supply of water, or from break, leakage or overflow."

Under this clause appellants claimed the right to furnish water under what is known as the alternating plan; that is, to maintain a flow for three days, and to shut it off for three days. They accordingly divided the consumers into two groups, and delivered water to one group for three days and then to the other for three days. The plant was not operated on Sunday. There is testimony tending to show that, while the water was furnished, the daily flow was nearly double the amount specified in the contract; so that respondent received approximately the same amount that he would have received under a continuous flow. Respondent maintains that he is entitled to a continuous flow, and is not to be compelled to accept his water in the manner in which it was delivered. He also offered testimony to show that the pumping facilities were inadequate. The trial court found that delivery was not made

in conformity with the contract, and concluded, as a matter of law, that "under and by virtue of said contract said plaintiff shall be entitled to a continuous flow of water from the 1st day of April of each and every year until the 1st day of October, at the rate of one cubic foot of water per second of time for each and every acre of land described in the contract herein mentioned, on payment of maintenance fee specified in said contract."

It is conceded that appellants have the right, under the terms of the contract, to create rules and regulations, but it is contended that such rules must be reasonable and do no violence to the letter or spirit of the contract. The obligations of a private company organized for the purpose of selling arid lands and furnishing water for their irrigation are quasi public, and no arbitrary action under the guise of rules or regulations is to be tolerated. But when rights in such an important element as water is in the arid regions are to be measured by the courts, we cannot lay down a rule that would give to the user an arbitrary right to use water at will. His rights are to be measured by his necessities (provided, of course, he receives the amount agreed to be delivered), and not by any fanciful notion of his own. In construing this class of contracts, courts must bear in mind—for the fact is obvious—that the policy of the nation to convert its deserts into fruitful fields can only be accomplished by conserving that element which alone can give it life. It is upon this principle that the right of common users of water for irrigation to make rules and regulations rests; and it is equally potent to prevent a judicial construction of a private contract which might give an advantage to the landowner, or permit a practice on his part which might lead to a waste of the conserving element.

To confirm our conclusion that such questions cannot be determined as questions of law, it is necessary only to suggest that the theory of irrigation is but imperfectly outlined, and its practice depends on conditions so varied that a fixed rule—the one here contended for—might, in another case work in-

justice to the consumer whose land might be of such quality, or his crops of such character, as to demand that water be furnished intermittently rather than in constant flow. It must not be held, under an open contract, that the user has a right to insist upon any given manner of use. Otherwise the right, to say nothing of the necessity, of prescribing rules and regulations would be of no avail to protect others from that prodigality which has so far marked the progress of the American pioneer. Neither must it be held, in the strict sense, that any one has a right to use water at will. Flowing waters are free to all, and only so far as sanctioned by custom or statute may they be put to private uses. While the cry "There is land for all" has sustained us in our disposition of the public domain, we are met at the outset of our irrigation policies by the fact that there is not, and probably never will be, even with perfect practice, water for all. It has been said that, "The forest and water problems are perhaps the most vital internal questions in the United States." Newell, chief of the division of hydrography of the United States Geological Survey, in his work on Irrigation, notes the fact that there has been but little progress in the practice of irrigation, "due largely to the fact that the men who are now bringing in the lands under ditch have for the most part received their training as farmers in the humid regions, and find it difficult to unlearn many facts which they regard as fundamental." He also notes the varying conditions of the soil—whether it be new or old; the season, whether of greater drought than ordinary; the needs of the various forms of plant life, and the low orders of plant life, "nitrifying organisms," all of which must be considered in determining whether water should be applied constantly or intermittently, and which can frequently be determined only by long-continued study and experiment. He says, at page 216:

"With the gradual development of the country and the bringing of more and more land under ditches, the need for water increases, and equity demands that no irrigator shall

take more than he can put to beneficial use. Flowing water must be considered as a common fund, subject to beneficial use by individuals according to orderly rules, each man taking only the amount he can employ to advantage. Under any other theory full development of arid regions is impossible."

In his instructive work on irrigation, F. H. King, professor of agricultural physics of the University of Wisconsin, on page 234 *et seq.*, indicates that intermittent irrigation is the better if not the proper plan; and Newell, page 180, says:

"It is so much easier to open the ditches and let the water flow freely than it is to guard and guide each tiny rill, that for economy of time and labor, if not from actual indolence, the irrigator is apt to let the water go its way."

And again, at page 215:

"The farmers, being accustomed to the use of large quantities of water, often find it exceedingly difficult to get along with less and continue to use excessive amounts, often to their own disadvantage. They are actuated in part by the consideration that, having paid for the use of the water, they are entitled to a certain quantity, and fear that if they do not take all of this their claim to it may be disputed. Some of them actually waste water to their own detriment from the mistaken belief that in so doing they are establishing a perpetual right to certain quantities."

These general observations may seem irrelevant. They are not put forth as legal propositions, but to illustrate our theory that we cannot declare, as a matter of law, that a regulation or rule of a water company, which provides for an intermittent flow rather than a constant flow, is unreasonable or unjust. Each case must be grounded on its own facts. To further illustrate, it may be that in the next case the character of the soil and other natural conditions would demand that the water be furnished by intermittent flow. In other words, what respondent now insists shall be declared as a fixed rule of law, if applied in another case would work injury to the landowner. *Hewitt v. San Jacinto & P. V. Irr. Dist.*, 124 Cal. 186, 56 Pac. 893, is a case bearing some relation to this one.

A contract, calling for an amount of water equal to one irrigating inch of water to each seven acres, was construed by the court. It was held that a continuous flow was not contemplated, because of the provision that the purchaser should "give notice *when*" he wanted the water. But, in passing, the court suggested that usage and custom may be considered as a means of interpretation of such contracts. Respondent cites this case to sustain the proposition that, it being shown that it was the custom throughout the Yakima valley to deliver water in a continuous flow, we must hold this custom to have been within the contemplation of the parties when the contract was made. The answer to this is that a practice is shown to have existed, but the testimony does not show a custom. On the other hand, it shows a growing tendency to adopt the alternating system which will give water in quantity at stated intervals. Nor does it show a necessity for a continuous flow. The most it does show is, to use the language of one of respondent's witnesses, that "water must be kept running on alfalfa ground nearly continuously until it is rooted." This is sustained by the opinion of an expert witness offered by respondent, who said of his recommendations to another irrigation company:

"That is a system somewhat similar to this one. My report to them was this: That in the beginning of the operation of their plant, it would be necessary to give a continuous flow, but after the crops had gotten started, and any way sufficiently rooted, then a rotation system would be advisable."

But, if it be conceded that a custom was shown, it would not govern a contract permitting the company to adopt reasonable rules and regulations, for custom can fix the manner of use of water for irrigation only when it is founded on necessity; or, to put it in the language of all the cases, an irrigator is entitled to use only so much as he can put to a beneficial use, for the public policy of the people of the United States will not tolerate waste of water in the arid regions.

Aside from all this, we think the evidence of custom in this

case is irrelevant. The purchaser made his contract knowing that he was depending on a pumping system, and any custom prevailing among the users of a natural flow of waters could not be held to bar the appellants from their right to make reasonable rules and regulations, so long as they furnished the amount of water contracted for under such conditions as the circumstances of the particular case demanded. In other words, the real question in all cases of this character should be, has the water company furnished the amount of water contracted to be furnished and in such manner as will, under approved methods, considering the natural conditions, insure the raising of crops? Our conclusion is that respondent is entitled to an amount of water equal to one cubic foot per second of time for each one hundred and sixty acres of land, and that a regulation providing for an intermittent flow is not to be held unreasonable, unless it be shown that appellants did not furnish the amount of water agreed upon.

As we said in the beginning, there is testimony to sustain the trial judge in his finding that there was not enough water so furnished, and for that reason we sustain him in his finding of damages, and allow the amount to be credited on the contract. No cases have been cited, and we find none, strictly in line with this one. Whether this be so because of the lack of zeal on the part of counsel or the court, or whether there is in fact no such case, we find no hesitation in holding on principle that water contracts must be held to be mutual, and when disputed they will be construed in the light of the necessities of the parties, rather than with reference to the arbitrary desire of either party. We, therefore, refuse to hold, as it is earnestly insisted that we should, that under the terms of the contract, respondent is entitled to a continuous flow of water.

This case will be reversed, and remanded with instructions to the lower court to modify its decree to conform to this opinion.

CROW and MORRIS, JJ., concur.

[No. 9227. Department Two. April 5, 1911.]

ADELAIDE SCARPELLI *et al.*, *Appellants*, v. WASHINGTON WATER POWER COMPANY, *Respondent*.[1]

TRIAL—SPECIAL VERDICTS—LACK OF EVIDENCE. A special finding that brackets were too light to sustain a wire, when there was no evidence on the subject, is a mere conjecture and not controlling.

TRIAL—SPECIAL VERDICTS — UNCONTROVERTED EVIDENCE. A special finding by a jury that a wire was not thrown down by a certain accident cannot be sustained where it disregards the uncontradicted evidence in the case.

TRIAL—PROVINCE OF COURT AND JURY. Where plaintiff's *prima facie* case, sufficient on motion for a nonsuit, is so fully explained and controverted as to leave no substantial conflict, the case should be taken from the jury.

ELECTRICITY—NEGLIGENCE — EVIDENCE — PRESUMPTIONS — TRIAL — QUESTION FOR COURT. Where plaintiff's case rested upon the legal presumption of the negligence of the defendant in allowing one of its high-power wires to fall from its support, plaintiff showing no cause for the fall of the wire, and the defendant's evidence showed that the power wire had just been knocked down by the breaking of a cable employed by the city in construction work on the street, which evidence was not controverted, there is no issuable fact for the jury, and the defendant was not guilty of negligence, as a matter of law; a presumption of law not being evidence of a fact or effective in the face of the opponent's *prima facie* evidence.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 2, 1910, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

Peacock & Ludden, for appellants, contended, among other things, that where there is a presumption of negligence, it is for the jury to say whether the defendant made a sufficient showing to relieve it from the charge of negligence. *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. 821, 46 L. R. A. 153; *Chicago City R. Co. v. Barker*,

[1]Reported in 114 Pac. 870.

209 Ill. 321, 70 N. E. 624; *Uggla v. West End St. R. Co.*, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. 481; *O'Flaherty v. Nassau Elec. R. Co.*, 34 App. Div. 74, 54 N. Y. Supp. 96; *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. 821, 46 L. R. A. 153; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Louisville etc. Consol. R. Co. v. Spencer*, 149 Ill. 97, 36 N. E. 91; *Cleveland etc. R. Co. v. Hornsby*, 202 Ill. 138, 66 N. E. 1052; *Selby v. Vancouver Water Works Co.*, 32 Wash. 522, 73 Pac. 504; *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016.

Post, Avery & Higgins, for respondent.

MORRIS, J.—Appeal from a judgment *non obstante veredicto*. Raphael Scarpelli, husband and father of appellants, was killed August 26, 1909, by being thrown from a wagon against the street curb. It was alleged in the complaint that the cause of his death was the negligence of the respondent in carelessly allowing one of its electric light wires, along Arthur street, in the city of Spokane, to become detached from the poles upon which it was strung across Pacific avenue, and negligently allowing the same to drop to the street; and that, while the wire was carelessly permitted to remain across the street, the deceased drove his team across it, causing the horses to become unmanageable and run away, and throwing deceased to the ground, whereby he met his death. Issue being made upon these allegations, trial was had, resulting in a verdict of $3,000 for plaintiffs, which verdict was set aside and judgment awarded defendant upon its motion. This act of the court is the main error relied upon, and a disposal of which must determine the case.

The evidence introduced by appellants tended to show that the deceased was driving east on Pacific avenue; that at the corner of Arthur street an electric light wire, known as a feed wire, had in some unknown manner, about ten minutes previous to the approach of deceased, become detached from its pole on the north side of Pacific avenue, and had fallen across the

avenue. By reason of the fact that the lots on the north side of the avenue were about ten feet above grade, and those on the south some feet below the grade, the wire as fallen was about six feet above the street surface on the north side, and within a short distance thereof on the south side. Deceased drove across on the south side, and reaching the dangling wire, one of the horses, as described by a witness, "was lunging ahead and the other one was trying to surge back. Finally he rallied them up and jumped over, or on it rather, and the wire was flopping around their legs and they started to run." They continued to run about one thousand feet, when they ran into the curb, throwing deceased to the ground, and inflicting injuries from which he died in a few minutes. This was the only evidence touching the alleged negligence when plaintiffs rested. It was shown that the insulation was off the wire in places, but as this was not charged as negligence and there was no allegation of general negligence, we deem this immaterial. It was of no value to plaintiffs in any event, since from their testimony the fallen wire was the proximate cause of the runaway. The defendant then moved for a nonsuit, which was denied, the court holding that the wire being a dangerous instrumentality, although no cause was shown for its fall, negligence would be presumed; and it being established that the horses came in contact with the fallen wire, it was sufficient to put the defendant upon proof.

The defendant then introduced its evidence, tending to show that the deceased drove under the wire before it fell, and that his horses did not come in contact with the wire, nor were they frightened thereby, but rather by the flopping black cloth of a photographer, who was standing on Pacific avenue taking pictures of the houses along the avenue. It was then shown that the city of Spokane was engaged in construction work along and upon Sprague avenue near Arthur street, west of and parallel with Pacific avenue; that in this work large chains and tackle were used in moving rocks weighing five or six tons; that the carrier ran on pulleys with an endless cable,

which was about four feet below the electric light wire of the defendant on Sprague avenue, and which formed a connection with the Arthur street wire near the street intersection; that while picking up a rock, the chain broke or slipped, and the block and tackle flew up and over and upon defendant's wire, the effect of which was to give the wire a violent jerk, breaking and badly splintering the cross-arm on the pole that carried the Arthur street line, and splintering or breaking the brackets on the poles carrying the wire south on Arthur street. These brackets were of oak, and were fastened to the poles with a sixty-penny spike at the top and a thirty-penny spike at the bottom. Three strands of wire were then wound around the bracket and the pole, so as to make the fastening more secure. The effect of the wrench on the pole just north of Pacific avenue was to break the bracket off, and the wire fell to the ground. This was about ten minutes before the accident to the deceased.

The defendant then rested; and the plaintiffs in rebuttal contested the testimony in regard to the cause of the fright of the horses, but offered no testimony as to the falling of the wire, nor attempted in any way to contradict the testimony in regard to the accident on Sprague avenue, or its effect upon the wires along Arthur street. The case was then given to the jury, with instructions to return several special verdicts, which need not be referred to, with two exceptions, as no question is raised in regard to them, The exceptions are an interrogatory in which the jury is asked the defect which caused the wire to fall, and answered: "Brackets too light for the distance between poles for said wire in question." The other was to the effect that the wire was not thrown down by any force applied at Sprague avenue. The first answer is outside of the issues. No evidence was introduced on that point, and the answer is nothing more than a conjecture on the part of the jury. The second answer disregards the unchallenged and uncontradicted testimony as to the effect of the accident on Sprague avenue. Upon the return of the

verdict, defendant made its motion for judgment, which was granted, and this appeal taken.

Appellants' first contention is that the court, having denied the nonsuit, should likewise have denied respondent's motion for judgment notwithstanding verdict. This does not necessarily follow. While ordinarily, as is said in *Weir v. Seattle Elec. Co.*, 41 Wash. 657, 84 Pac. 597, "testimony which is sufficient to carry a case beyond a nonsuit will carry it to the jury at the close of the testimony," it must be understood that the court is there speaking of contested or controverted testimony which leaves an issue of fact for the jury to decide. But, as is likewise said in the same opinion: "Cases may arise in which a plaintiff's *prima facie* case is so fully explained and controverted as to leave no substantial conflict in the testimony." In such cases it is the duty of the court to take the case away from the jury, either upon a challenge to the sufficiency of the testimony or on a motion for judgment notwithstanding verdict.

"The facts being undisputed, it becomes the duty of the court to apply the law, there being no issue to submit to a jury." *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109.

We only need consider, then, whether this was a proper case for the application of such a rule. The ruling on the motion for a nonsuit not being before us for review, it must be conceded that at that time, as held by the court, appellants had made out a *prima facie* case, and had by their evidence established a legal presumption of negligence in showing the contact of the horses with the fallen wire and the consequent result. It thereupon became the duty of the respondent, if it would seek the benefit of the announced rule, to so fully explain and controvert this legal presumption as to leave no issuable fact for the jury to pass upon—not as to the manner of the accident or its results, but upon the charge of negligence made against it in alleging that the fall of the wire was due to its negligence. This was the main charge

against which it must defend, and upon which it must, by uncontroverted evidence, establish the negative to escape liability. Has it done so? We agree with the lower court in holding that it has, in showing the Sprague avenue happening, with its consequent effect upon the Arthur street wire. Respondent could not be charged with the Sprague avenue occurrence, as that work was being done by an independent agency—the city of Spokane. The appellants having shown no cause for the falling of the wire, the only evidence before the court as to the cause was that given by respondent. So that upon the charge of negligence there was, at the close of the case, no controversy in the evidence; and the question thereupon became one of law for the court, and not one of fact for the jury. Had the appellants in any manner controverted this evidence, by a showing that it did not occur as contended by respondent, or, occurring, did not cause the Arthur street wire to fall from its post as shown by respondent, then there would have been left a determinable question of fact for the jury; but until there was some issue made as to this evidence, there was nothing to submit to the jury.

In all the cases cited by appellants there was some issuable fact in the showing made by the defendant to relieve itself from responsibility, as in *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. 821, 46 L. R. 9. 153, where the defendant sought to relieve itself by showing that the engine was of standard make and in first class condition; that it had been inspected before going out with the train; that it was equipped with all modern appliances for starting and stopping; that it was in charge of competent men. We held that there was still an issuable fact for the jury as to the character of the inspection, the negligence of the engineer in leaving the engine in charge of the fireman, whether the fireman was equal to the emergency which presented itself when it became apparent the brakes were not in working order, and whether the engine was permitted to approach the train in making the coupling at too great a speed. All these ques-

tions were facts to be determined from the testimony under the issues, and the court could not take the decision of them away from the jury. But we have no such facts to be passed upon here. The only fact is, did such a thing occur, with such a result. Upon this question there was no controversy, and hence no issue for the jury.

In *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016, cited by appellants, the case was submitted to the jury upon plaintiff's evidence, the defendant not attempting to relieve itself from the legal presumption, nor offer any explanation as to the cause of the accident. The presumption, not being weakened or explained, became effectual in law and was decisive of the case. When a plaintiff in actions of this character makes no attempt to show the negligent cause of the act complained of, but relies wholly on the legal presumption of negligence his facts establish, he must accept or controvert the defendant's explanation as to the cause of the act, and show its insufficiency or other nonapplicable features, if he would prevent the court from holding, as a matter of law, that the presumption is overcome.

"The rule of law is, doubtless, that, where there is no conflict of testimony, where the existence of a fact is clearly proved by the undisputed testimony, the court should hold that the fact is established." *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582.

Referring to the contention of appellants that the question whether the testimony introduced for the purpose of overcoming such presumption is sufficient for that purpose and should be submitted to the jury as a question of fact, it is said, in answering the same contention in the *Spaulding* case:

"The argument would probably be a sound one were this a presumption of fact. Its weight and force and consequently the amount of proof essential to overcome it, would in such case be for the jury and not for the court, to determine. But the presumption under consideration is clearly one of law and is governed by an entirely different rule. Its weight and

effect, and the amount and character of the proof necessary to overcome it, are questions for the court. . . . In such cases, if there is a conflict of testimony, the jury must determine what facts are proved; but where as in this case there is no such conflict, and the testimony is clear and satisfactory against the presumption, it is the duty of the court to hold as a matter of law that the presumption is overcome."

The same rule is announced in *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Central of Georgia R. Co. v. Waxelbaum*, 111 Ga. 812, 35 S. E. 645; *Baltimore City Pass R. Co. v. Nugent*, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161; *Woodward v. Chicago M. & St. P. R. Co.*, 145 Fed. 577.

In *Peters v. Lohr* (S. D.), 124 N. W. 853, the court, in speaking of the effect and character of "presumptions," says:

"A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced *prima facie* evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponents' *prima facie* evidence with evidence and not presumptions. A presumption is not evidence of a fact, but purely a conclusion. Elliott Ev. §§ 91, 92, 93; Wigmore Ev., §§ 2490, 2491."

Appellants not having attempted to lessen the probative force or value of respondent's testimony, either in their main case or in rebuttal, cannot make a controverted question of fact out of that over which there is no controversy, nor treat as a disputed issue of fact that over which there is no dispute. The court was therefore justified in ruling as upon a question of law.

There are other suggested errors, but this one is so de-

terminative of all the questions in the case that, while considering the others, we will not refer to them.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, and CROW, JJ., concur.

[No. 9134. Department One. April 5, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. A. W. BUDDRESS, *Appellant*.[1]

CONTEMPT — IN VIEW OF COURT — STATUTES. Rem. & Bal. Code, § 2372, defining contempt of court as disorderly or insolent behavior committed during the sitting of the court, "in its immediate view and presence," is declaratory of the common law and equivalent to contempt "in the face of the court."

CONTEMPT—JUDGMENT—IN VIEW OF COURT—RECITATION OF FACTS—SUFFICIENCY. A judgment of summary punishment for contempt of court sufficiently states that the acts were committed in the "immediate view and presence of the court," where it recites the pendency of the action, and that the accused was applying to have a judgment "signed by the court," and that in the presence of the judge at chambers in the court house, he used boisterous and angry language and gestures, and in the clerk's office and in the immediate presence of the court engaged in a fight; the only reasonable construction being that it was in "view" of the court although that word was not used.

SAME. Such judgment shows a contempt within Rem. & Bal. Code, § 2372, by a breach of the peace or other disturbance directly tending to interrupt the proceedings of the court.

CONTEMPT—IN VIEW OF COURT—RECESS—JUDGMENT—RECITATION OF FACTS—SUFFICIENCY. A summary judgment of contempt of court is not open to the objection that it fails to show that the court was in session, where it appears that the accused was guilty of a breach of the peace directly tending to interrupt the proceedings of a court and that the court was transacting business when the interchange of words took place; and it is immaterial that the court suspended business during a fight that followed, or was in recess.

CONTEMPT—PROCEEDINGS—CONSTITUTIONAL LAW—DUE PROCESS OF LAW. A summary punishment of contempt committed in the presence of the court is not a denial of due process of law merely because there was a delay in entering the order, due process meaning accord-

[1]Reported in 114 Pac. 879.

ing to the established forms of law; especially where defendant's appeal recited that the notice of appeal was taken in open court on the same day that the act was committed.

CONTEMPT—PROCEEDINGS—APPEAL—FACTS RECITED IN JUDGMENT—REVIEW. Upon appeal from a summary conviction of contempt committed in the presence of the court, the facts recited in the order are taken as true; and where they show jurisdiction and are sufficient to constitute contempt, there can be no further inquiry on appeal.

DUNBAR, C. J., and FULLERTON, J., dissenting.

Appeal from an order of the superior court for Jefferson county, Still, J., entered June 13, 1910, adjudging the defendants guilty of contempt of court. Affirmed.

A. W. Buddress, pro se.

Jas. W. B. Scott, for respondent.

GOSE, J.—On the 6th day of June, 1910, an order was made by the superior court of Jefferson county and filed on June 13 following, summarily adjudging the defendants guilty of contempt. The defendant Buddress has appealed.

The order, omitting title, signature, and the attestation of the clerk, is as follows:

"This cause coming on to be heard summarily in contempt proceedings herein and the defendants above named, and each of them, being personally present in above court;

"And whereas an action was pending in the above entitled court, entitled Elston Cromwell versus Samuel Irwin, in which Elston Cromwell is guardian of the estate of Ora Irwin, a minor, and said action was pending on the 6th day of June, 1910;

"And whereas, on that day said cause was dismissed without prejudice, and before the order of dismissal was signed by the court and before the court had left the court room where said cause was heard, and upon the application of A. W. Buddress, Esq., to have the said order of dismissal signed by the court and in the presence of the judge, at recess and in the chambers in the court house of said county, the defendants, A. W. Buddress and Allan Trumbull did each with the other use abusive, boisterous, angry, insulting, vicious language and gestures against each other, and did then and there in the clerk's

office in the immediate presence of the court, each with the other engage in a fight, which said quarrel and fight arose over the proceedings and proposed order in said cause; that such quarrel and fight did in fact impair, hinder, interrupt and impede the orderly course of justice in the deliberation of the court and the signing of said order of dismissal; and that said A. W. Buddress and Allan Trumbull, and each of them, had become guilty of contempt of the above entitled court;

"And whereas, the said court did at the same time by its said order adjudge and declare the said A. W. Buddress and Allan Trumbull, and each of them, guilty of contempt of said court, by virtue of said quarrel and fight, and did order said A. W. Buddress and Allan Trumbull, be punished for the contempt of court committed as aforesaid, by the payment of a fine of fifteen dollars each, and that in case said fine be not paid within five days after the entry of this order, then in such case the said defendants be committed to the custody of the sheriff, and imprisoned in the county jail until such fine is paid as provided by law, and for such imprisonment and detention this order and judgment shall be sufficient warrant and authority.

"Done in open court this 6th day of June, 1910.

"Lester Still, Judge."

The statutory power of the court to summarily punish for contempt, together with the procedure, is conferred and defined by Rem. & Bal. Code, § 1051. Rem. & Bal. Code, § 2372, subds. 1 and 3, thus defines the elements of contempt of court:

"(1) Disorderly, contemptuous or insolent behavior committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceeding or to impair the respect due to its authority."

"(3) Breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of a court, jury or referee."

These sections are but declaratory of the common law. *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717; 4 Blackstone Commentaries, 286; *Ex parte Terry*, 128 U. S. 289. The power to summarily punish for contempt

committed, as Blackstone terms it, "in the face of the court," is a power that has existed since the establishment of courts. Without such power the courts could neither preserve order nor enforce obedience to their processes. The words of the statute, "in the immediate view and presence" of the court, are equivalent in meaning to the common law phrase "in the face of the court."

The appellant's contentions are, (1) that the order states conclusions and not facts, and that it fails to recite that the contempt was committed within the "view" of the court; (2) that it does not recite that the court was in "session;" (3) that the order failing to recite the facts, he has not been accorded the due process of law guaranteed him by both the state and the Federal constitutions; and (4) that the facts do not warrant a conviction. In support of the first contention, the appellant cites the statute, Rem. & Bal. Code, § 1051; *In re Coulter*, 25 Wash. 526, 65 Pac. 759; *Otis v. Superior Court of Los Angeles County*, 148 Cal. 129, 82 Pac. 853; *Overend v. Superior Court of City and County of San Francisco*, 131 Cal. 280, 63 Pac. 372; *Batchelder v. Moore*, 42 Cal. 412; *State v. District Court of Taylor County*, 124 Iowa 187, 99 N. W. 712; *Drady v. District Court of Polk County*, 126 Iowa 345, 112 N. W. 115; *Crites v. State*, 74 Neb. 687, 105 N. W. 469; *State ex rel. Breen v. District Court*, 34 Mont. 107, 85 Pac. 870; 9 Cyc. 66, note 64.

It is held in the *Coulter* case that, while the legislature may not lawfully take away the power to punish for contempt committed in the presence of the court, it can reasonably limit the exercise of that power and declare what acts or omissions constitute contempt, define the character and limit the amount of punishment that may be inflicted, prescribe the method of procedure by which the recusant party shall be brought before the court, and the procedure to be followed upon the trial. The other cases cited announce the rule that, in contempt proceedings, courts exercise a strictly limited jurisdiction; and that a judgment convicting one of contempt

is invalid, unless the record of conviction shows upon its face that the matter charged was within the jurisdiction of the court. They announce the further rule that, if the contempt consists of acts done in the immediate view and presence of the court, the judgment must so recite, and the facts recited must come within the legal definition of contempt. These views are in harmony with the express provisions of our statute.

We think, however, that the order does state that the acts were committed in the "immediate view and presence" of the court. It recites, that an action was pending in court; that the appellant was applying to have an order of dismissal "signed by the court," and that in the presence of the judge at chambers in the court house, the appellant used "boisterous" and "angry" "language" and "gestures," and that in the clerk's office, "in the immediate presence" of the court, he engaged in a fight with his codefendant. While the court did not use the word "view," we think that the only reasonable construction of the language of the order, read as an entirety, is that the unseemly acts recited were done in the face of the court. Any other construction would narrow the plain meaning of the order. It is clear also that, while the order contains certain adjectives that are conclusions, it recites facts which are highly contumacious in a member of the bar and an officer of the court. The word "boisterous" is defined in Webster's New International Dictionary as, "loud; stormy; noisy." If the appellant and his codefendant used towards each other loud and angry language and gestures, and engaged in a fight in the presence of the court while the former was applying for an order, their conduct was contemptuous, and the court would have been both lacking in dignity and recreant to its duty if it had not visited summary punishment upon them.

The second contention is, that the order fails to disclose that the court was in session. It does, however, show a "breach of the peace, noise or other disturbance, directly tending to interrupt the proceedings of a court." This, as we have

seen, is made contempt of court by the statute. It affirmatively appears in the order that the court was transacting business when the exchange of words commenced. If it temporarily suspended business during the fight for want of parties, those who brought about the suspension cannot complain. *Baker v. State*, 82 Ga. 776, 9 S. E. 743, 14 Am. St. 192, 4 L. R. A. 128; *Barrett v. State*, 1 Wis. 156; *In re Neagle*, 135 U. S. 1. In the *Baker* case, Baker, a suitor in the court, a few minutes before the convening of court at the morning hour in the court room, discussed his case in the presence of the judge and in the presence and hearing of the jurors before whom his case would probably be tried, if tried at that term. The court said to him that the jurors who were present might be called to try his case, and warned him to refrain from further commenting upon it. To a second warning, he replied: "I have got as much right to talk as you have. The court is not in session and you have no more power than I have." Upon these facts he was summarily adjudged guilty of contempt. In considering the question as to whether the court was in session, as a matter of law, when the remarks were made, the court said:

"And we think that whenever a judge of the city court is in the court room during term, and a suitor there calls upon him to deal in any manner with, or answer questions concerning, a pending case, the court is in session respecting that case, to the extent at least of keeping the suitor in order in discussing it or making remarks about it, and that any misbehavior of the party then and there occurring takes place in the presence of the court, within the spirit and meaning of the statute. . . ."

The statute referred to is no broader in its scope than our statute. It was further said that the court is not dissolved by a recess, and that misbehavior affecting the administration of justice, in the court house and in the immediate presence of the judge, especially by a suitor, is misbehavior in the presence of the court, and may be punished summarily as a contempt

of court. We are in hearty accord with the view announced in that case.

The appellant was not denied due process of law. Due process of law means that the procedure was according to the established forms of law. *Drady v. District Court, supra.* Jurisdiction of the person of the appellant attached instantly upon the contempt being committed in the face of the court. That jurisdiction was not lost by the delay in filing the order. The order recites that it was made in open court, the defendants "being personally present." *Ex parte Terry, supra.* Moreover, the only notice of appeal given by the appellant was in open court on the day the contempt was committed, and the appeal bond recites that the appellant was adjudged guilty of contempt on the day of the date of the order. It is apparent that, if the order was not made upon that date, the notice of appeal would be ineffectual.

The last contention is that the facts do not warrant a conviction. The law is well settled that, in hearing cases upon appeal, for contempt committed in the presence of the court, the facts recited in the order are taken as true, and no other or different facts will be considered.

"Every court is the exclusive judge of its own contempts, and its judgment is subject to review only upon the point of jurisdiction." *Otis v. Superior Court, supra.*

In *Ex parte Terry*, at pages 308-9, this view is admirably stated in the following language:

" 'A breach of the peace *in facie curiae* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial.' So in *Whittem v. State*, 36 Indiana 311,: 'When the contempt is committed in the presence of the court, and the court acts upon view and without trial and inflicts the punishment,

there will be no charge, no plea, no issue and no trial; and the record that shows the punishment will also show the offence, and the fact that the court had found the party guilty of the contempt; on appeal to this court any fact found by the court below would be taken as true, and every intendment would be made in favor of the action of the court.' Again, in *Ex parte Wright*, 65 Indiana 504, 508, the court after observing that a direct contempt is an open insult in the face of the court to the persons of the judges while presiding, or a resistance to its powers in their presence, said: 'For a direct contempt the offender may be punished instantly by arrest and fine or imprisonment, upon no further proof or examination than what is known to the judges by their senses of seeing, hearing, etc.' 4 Stephens Com. Bk. 6, c. 15; Tidd's Practice, 9th ed. London 1828, 479-80; *Ex parte Hamilton & Smith*, 51 Alabama 66, 68; *People v. Turner*, 1 California 152, 155. It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused, and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kennedy*, 7 Wheat. 38, 45, may be here repeated: 'Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice.' "

In *State ex rel. Breen v. District Court*, *supra*, in speaking of the conclusiveness of the facts recited in the order, it is said:

"In such case, however, we may not look beyond the contents of the order itself."

In *State v. Nicoll*, 40 Wash. 517, 524, 82 Pac. 895, speaking directly to the question, it is said:

"The question whether it [the court] arrived at its con-

clusion summarily or arbitrarily, or after the most painstaking investigation, is not subject to review here."

See, also, *Rawson v. Rawson*, 35 Ill. App. 505.

In the very nature of things, the orderly administration of justice makes it indispensable that the facts found by the court shall be conclusive in a judgment for contempt committed in the presence of the court. If the facts found show jurisdiction and are sufficient in law to constitute contempt, further inquiry is foreclosed. The court acts upon what it sees and hears, and upon that evidence and no other the right to inflict summary punishment must rest. Were we to consider the statement of facts certified by the referee, we would not be reviewing the case upon the facts upon which the court acted, but trying it anew upon another state of facts. This would be anomaly in appellate procedure.

The judgment is affirmed.

MOUNT and PARKER, JJ., concur.

DUNBAR, C. J. (dissenting)—Notwithstanding the forceful argument made by Judge Gose, and the pertinency of the cases cited in the opinion, I am unable to divest my mind of the idea that, in the interest of liberty and in harmony with the genius of our government, every citizen should have a right at some time and in some place to defend himself against a charge of crime a conviction of which works a deprivation of his liberty or his property rights. The inconveniences suggested in the majority opinion may arise, but the considerations I have mentioned are paramount. I am therefore compelled to dissent.

FULLERTON, J., concurs with DUNBAR, C. J.

[No. 9368. *En Banc.* April 5, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN HARDWICK, *Appellant*.[1]

GAMING — INFORMATION — SUFFICIENCY. An information charging merely the opening and conducting of a gambling game without alleging that it was done in any of the capacities prohibited by Rem. & Bal. Code, § 2469, is insufficient to sustain a conviction of a felony under that section, or of a misdemeanor under Rem. & Bal. Code, § 2470, prohibiting betting or wagering on a game carried on in violation of § 2469.

DUNBAR, C. J., dissents.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 13, 1910, upon a trial and conviction of the crime of conducting a gambling game. Reversed.

Cain & Hurspool, for appellant.

Everett J. Smith, for respondent.

GOSE, J.—The defendant was tried, convicted, and sentenced as for the commission of a felony, upon an information charging that "the said John Hardwick, on the 26th day of March, 1910, in the county of Walla Walla aforesaid, did wilfully and unlawfully open, conduct, carry on, and operate a gambling game and game of chance." etc. This appeal followed.

The appellant demurred to the information, upon the ground that it does not state facts sufficient to constitute a crime or offense. The first assignment of error is predicated upon the overruling of the demurrer. The point relied on is that the information does not allege that the appellant conducted the game in any one of the several capacities prescribed by the statute. The applicable provisions of our statute are as follows:

[1]Reported in 114 Pac. 873.

"Every person who shall open, conduct, carry on or operate, whether as owner, manager, agent, dealer, clerk, or employe, and whether for hire or not, any gambling game or game of chance, played with cards, dice, or any other device, or any scheme or device whereby any money or property or any representative of either, may be bet, wagered, or hazarded upon any chance, or any uncertain or contingent event, shall be a common gambler, and shall be punished by imprisonment in the state penitentiary for not more than five years." Rem. & Bal. Code, § 2469; Laws of 1909, p. 955, § 217.

The state asserts that the information charges the commission of a felony under the section quoted. The old law (Rem. & Bal. Code, § 2931; Laws 1903, p. 63, § 1), provides that:

"Any person who shall conduct, carry on, open or cause to be opened either as owner, proprietor, employee or assistant, or in any manner whatever, whether for hire or not, any game of faro . . . or any banking or other game played with cards, dice or any other device, . . . whether the same be played or operated for money, checks, credits, or any other representative or thing of value,"

should be guilty of a felony. This statute has been repealed. Laws of 1909, p. 906, § 52 (Rem. & Bal. Code, § 2304); *In re Dietrick*, 32 Wash. 471, 73 Pac. 506. The only change effected by the new law touching the present inquiry is the substitution of the word "whether" for the word "either," and the omission of the words "or in any manner whatever." The old statute received construction in *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817, and *State v. Smith*, 58 Wash. 235, 108 Pac. 618. We said in the *Gaasch* case:

"The object of the felony statute was to suppress gambling resorts and to punish those who maintained them. Hence, considering the purpose of the law as well as its letter, to sustain a conviction for a felony there must have been some charge of proprietorship. It is not sufficient to say that the one charged merely played or sat in the game, but the information should allege his relation as owner, proprietor, employee, or as assistant to one who sustains a proscribed relation to the game. The authorities sustain this view.

State v. Dennison, 60 Neb. 157, 82 N. W. 383; *Brazele v. State*, 86 Miss. 286, 38 South. 314."

And in the *Smith* case, we said:

"By our former holdings it is plain that this information does not charge a felony, since it does not charge the defendants as owners, proprietors, or employees; hence, it only charges the misdemeanor. . . ."

It seems to us that the substitution of the word "whether" for the word "either" adds nothing to the force of the statute. Either word could be omitted without changing the meaning of the law. The logic of the two preceding cases is that the words "owner," "manager," etc., are definitive of the class against which the penalty of the statute is directed. The information does not bring the appellant within the proscribed class. It is argued by the state, in substance, that the statute makes it a felony for any person to conduct any gambling game in any of the methods enumerated in the statute, and that the words "owner, manager, agent, clerk, or employee" have no significance. It would seem that, if the law makers had intended to denounce every person as a common gambler and a felon, who conducted a game in any manner whatever or without regard to the manner, they would have chosen words clearly indicative of that intent. As we said in *State v. Anderson*, 61 Wash. 674, 112 Pac. 931, it is a well-settled rule of construction in criminal cases that,

"Laws are interpreted in favor of liberty, and if a statute is capable of two constructions, one of which makes a given act criminal and the other innocent, the statute will be given the construction which favors innocence."

It is also clear that the information does not charge a misdemeanor under the provisions of Rem. & Bal. Code, § 2470. That section has reference only to a person who bets or wagers upon a game carried on in violation of § 2469. Without pursuing the question further, we think the information is fatally defective under the view announced in the *Gaasch* and *Smith* cases.

The judgment is reversed, with directions to sustain the demurrer.

MOUNT, PARKER, CHADWICK, FULLERTON, and CROW, JJ., concur.

DUNBAR, C. J. (dissenting)—I dissent. I am unable to comprehend how one can, in the language of the information, "wilfully and unlawfully open, conduct, carry on and operate a gambling game and game of chance," without operating it either as owner, manager, dealer, clerk, or employee; and if this be true, the requirements of the statute are in substance met by the information, and the judgment should be affirmed.

[No. 9311. Department One. April 7, 1911.]

C. H. CLEMONS *et al.*, *Respondents*, v. GRAYS HARBOR & PUGET SOUND RAILWAY COMPANY, *Appellant*.[1]

RAILROADS—CROSSINGS—CONTRACTS—BREACH. Where a railroad company agreed to construct and maintain a crossing according to specified plans, and after its construction the crossing collapsed, the fact that it was constructed according to the plans does not relieve the company from liability for failure to maintain it.

RAILROADS—RIGHT OF WAY—CONVEYANCE—CONSTRUCTION—STIPULATED DAMAGES. A provision in a right of way deed that the grantee was "not to interfere" with the grantors' use of an intersecting logging road, and should pay $1,000 per day as stipulated damages, "if such interference occurs," has no application to a breach of other provisions requiring the grantee to construct and maintain a crossing, which collapsed and interrupted the use of the logging road for four days, in the absence of evidence that the collapse was the result of the grantee's "interference," where the deed provided for revocation or forfeiture for failure to strictly comply with its terms; since the deed did not clearly express an intention that the damage clause was to apply in case of any breach except an affirmative or physical act of "interference" (DUNBAR, C. J., dissenting).

[1]Reported in 114 Pac. 865.

DAMAGES—STIPULATED DAMAGES—CONSTRUCTION OF CONTRACT. A provision for drastic stipulated damages will not be extended by construction to embrace matters not clearly within its terms.

RAILROADS—CROSSINGS—CONTRACTS—BREACH—NOMINAL DAMAGES. Upon breach of a stipulation by a railroad company to maintain a crossing, which collapsed from an undisclosed cause, the company is liable for nominal damages.

DAMAGES—STIPULATED DAMAGES—PENALTY. A provision in a right of way deed whereby the grantee agreed to pay $1,000 a day for each day it interfered with the operation of an intersecting logging road, as liquidated damages and not as a forfeiture or penalty, is an agreement for stipulated damages.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered October 21, 1910, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for damages. Reversed.

Bridges & Bruener (*Bogle, Merritt & Bogle*, of counsel), for appellant, contended, among other things, that it was admissible to show by extrinsic evidence that the stipulation for damages was unreasonable and in the nature of a penalty. *Hathaway v. Lynn*, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551; *De Graff, Vrieling & Co. v. Wickham*, 89 Iowa 720, 52 N. W. 503, 57 N. W. 420; *Halff v. O'Connor*, 14 Tex. Civ. App. 191, 37 S. W. 238; *Wilcox v. Walker* (Tex. Civ. App.), 43 S. W. 579; *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467; *Jennings v. Willer* (Tex. Civ. App.), 32 S. W. 24; *Foley v. McKeegan*, 4 Iowa 1, 66 Am. Dec. 107; *Hicks v. Monarch Cycle Mfg. Co.*, 176 N. Y. 111, 68 N. E. 127; *Lee v. Carroll Normal School Co.*, 1 Neb. (Unof.) 681, 96 N. W. 65; *Coen & Conway v. Birchard*, 124 Iowa 394, 100 N. W. 48; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490; *Wagner Co. v. Cawker*, 112 Wis. 532, 88 N. W. 599; *Sanford v. First Nat. Bank of Belle Plaine*, 94 Iowa 680, 63 N. W. 459; *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132, 39 Am. St. 626, 19 L. R. A. 456; *Muse v. Swayne*, 2 Lea 251, 31 Am. Rep. 607; *Disosway v. Edwards*, 134 N. C.

254, 46 S. E. 501; *Burrill v. Daggett*, 77 Me. 545; *Perkins v. Lyman*, 11 Mass. 76, 6 Am. Dec. 158.

W. H. Abel, for respondents.

Gose, J.—On the 12th day of April, 1909, the plaintiffs owned certain land, and a logging railroad which they were operating for the purpose of hauling logs to, and placing them in, the Chehalis river. On that day the plaintiffs and the defendant, a public service corporation, entered into a contract, wherein and whereby the plaintiffs conveyed certain of its land to the defendant for a right of way for its railroad; and the defendant, as a part of the consideration for the conveyance of the land, agreed to do and refrain from doing certain acts. The part of the instrument material to the questions here presented is as follows:

"Witnesseth: That first parties for the consideration of the sum of fifteen hundred dollars ($1,500) to them in hand paid by the second party, and for the other considerations hereinafter mentioned, which considerations are to be considered as conditions subsequent, do hereby grant, sell, convey, confirm and quitclaim unto second party, its successors and assigns, the following described real estate, . . .

"To have and to hold, unto the said second party, its successors and assigns forever upon the considerations and subject to the limitations hereinafter provided, which conditions and limitations are to be construed as conditions subsequent, and upon failure of second party, its successors and assigns, to strictly perform the same, this deed and the rights conveyed hereby, are subject to revocation and forfeiture by first parties, their heirs or assigns. . . .

"Second party agrees to construct and maintain the necessary crossing where its line intersects the logging railroad of first parties, said crossing to be an under-crossing and to be built in accordance with the plans submitted by second party to first parties according to a blue print this day furnished, which has been marked 'Exhibit B,' and said crossing is to be maintained by second party, its successors and assigns, and second party, for itself, its successors and assigns, assumes the responsibility in connection with the

maintenance and operation of said crossing and to furnish water barrels upon said crossing to safe-guard the same from fire. Where the lines of the first parties and of the second party intersect, it is agreed by second party that it shall and it does hereby allow first parties, their heirs and assigns, to maintain and operate their logging road as the same is now located, maintained and operated, . . .

"It is further agreed that, whereas first parties are engaged in extensive logging operations, the extent of which is well known to second party, and any delay or interference with said logging operations or with the railroad or first parties' use in connection therewith, would cause great damage and loss of profits to first parties, which damage and loss of profits would be difficult of ascertainment;

"Now, therefore, second party agrees not to interfere with the use by first parties of their logging railroad in such manner that first parties cannot haul logs over said railroad to the Chehalis river, but if such interference occurs, the second party hereby agrees to pay to first parties therefor the sum of one thousand dollars ($1,000) per day for each day of such interference and a proportionate part thereof for any part of a day of such interference, and said sum is hereby agreed upon as liquidated damages and not as a forfeiture or penalty, and it is agreed between the parties hereto that by such interference first parties would actually suffer loss in the amount aforesaid."

The defendant entered into the possession of the land conveyed, and constructed its railroad and an overhead crossing for the logging road at the point of intersection of the two roads. On April 12, 1910, the crossing in part collapsed, so that for a period of four days the logging road could not be operated. A few days later the plaintiffs commenced this action for the purpose of recovering the sum of $4,000, which they claimed under the liquidated damage clause of the contract.

The defendant admits the making of the contract, admits that it constructed its road and the crossing for the logging road at the point of intersection of the two roads, and admits that the crossing fell, so that the logging road could not be operated for the period alleged. It alleges affirma-

tively, that it constructed the crossing according to the blue print referred to in the contract; that the work was done in a careful and substantial manner; that the damages agreed upon were unreasonable and unlawful; and that the damages did not exceed fifty dollars per day. This was put in issue by the reply. The plaintiffs offered evidence tending to show that the crossing was negligently constructed, but before resting their case this testimony was withdrawn. After the plaintiffs rested, the defendant offered to prove the facts embraced in its affirmative pleading, and that the damages could be ascertained. The offer was denied, and a judgment was entered in favor of the plaintiffs for $4,000, being at the rate of $1,000 per day for the four days' suspension of the logging road.

The discussion has taken a somewhat wide range upon the part of the appellant. It argues that it is not liable under the contract for a suspension of the logging operations caused by the act of God or of the public enemy. That question is not presented by the record. Again, the appellant says:

"The cause of the interruption in the operation of the logging railroad was an earth slide on the upper part of the crossing."

We have not found such evidence in the record. It is true that one of the respondents' witnesses testified that the collapse of the crossing was caused "by a slide or the piling giving way;" and another testified that it was caused "from lack of penetration of the piling." Later, however, this testimony was withdrawn. We express no opinion upon the competency or materiality of such evidence.

The contract, however, has been breached by the appellant. It is clear from reading it as an entirety that the appellant could not relieve itself from liability by constructing the crossing according to the blue print, for the contract expressly provides "that said crossing is to be maintained by second party [the appellant] its successors and

assigns; and second party for itself, its successors and assigns, assumes the responsibility in connection with the maintenance and operation of such crossing."

Passing to the pivotal point in the case, we cannot think that the respondents are entitled to recover under the liquidated damage clause upon the facts stated. The showing made is, that the appellant constructed the crossing; that it fell, and that the respondents' logging operations were suspended for four days. The cause of the fall of the crossing is not shown. A reference to the habendum clause of the deed discloses that the conditions and limitations in the instrument are to be treated as conditions subsequent, and that upon the failure of the appellant to strictly perform them, the "deed and the rights conveyed are subject to revocation and forfeiture." Again, near the end of the contract, it is provided that the "agreements to be performed" by the appellant are a part of the consideration for the instrument, "and are material considerations therefor," and that upon the failure of the appellant to strictly comply with the terms "of this instrument," the deed, at the option of the respondents, "is subject to revocation and forfeiture."

Further analyzing the instrument, we find that the appellant agreed to "construct and maintain" the necessary crossing at the point of intersection of the roads, and that it "assumes the responsibility in connection with the maintenance and operation of said crossing." There is no provision, however, to the effect that, if it fails to maintain the crossing and the logging operation is suspended thereby, the liquidated damage clause shall apply. In the clause which immediately precedes the damage clause it is agreed that the respondents are engaged in extensive logging operations, and that any "delay" or interference with such logging operations or with the railroad or first parties' "use in connection therewith," would cause the latter great damages and loss of profits, and that the damages and loss of profits would be difficult of ascertainment. In the damage clause following

this language, the word "delay" is omitted, and the appellant agrees "not to interfere" with the respondents' use of the road in such manner that they cannot haul logs over the same, and agrees that, "if such interference occurs," the appellant will pay to them the sum of $1,000 per day for each day of "such interference, and a proportionate part thereof for any part of a day of such interference" as liquidated damages, and that the respondents would actually suffer to that extent "by such interference." To recapitulate, it appears that, for certain breaches of the contract upon the part of the appellant, the deed is subject to revocation and forfeiture at the option of the respondents. This provision, as we have seen, is twice inserted. Whether the stipulation is enforceable against a public service corporation when the land conveyed has become a part of its line of road, is not before us. Again, as we have pointed out, the appellant agreed to construct and maintain the necessary crossings, and to emphasize this obligation upon its part it "assumes the responsibility in connection with the maintenance and operation of such crossing." It would seem that, if it had been intended that the damage clause should apply if the operation of the respondents' road was suspended by a breach of any one of the obligations assumed by or imposed upon the appellant, such intention would have been clearly expressed, and not left to be gathered from words of doubtful meaning. The damage clause is a drastic one, and it will not be extended by construction to embrace matters not clearly within its terms. We need not speculate as to what delinquencies it may cover. It suffices to say that it is not applicable to the facts before us.

Upon the evidence, the respondents were entitled to a judgment for nominal damages for the failure of the appellant to maintain the crossing. In addition to nominal damages, they may, upon proper proof, recover their actual damages; and if they can show that the crossing fell through the "interference" on the part of the appellant, they can re-

cover the liquidated damages. The word "interference" here used evidently has reference to some affirmative or physical act upon the part of the appellant. It is clear that the parties intended to stipulate for liquidated damages and not for a penalty. *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165.

The judgment is reversed, with directions to grant a new trial, and to permit the parties to recast their pleadings if they desire.

MOUNT and PARKER, JJ., concur.

DUNBAR, C. J. (dissenting)—It is inconceivable to me that that portion of the contract providing for stipulated damages was made with reference to any affirmative action on the part of the railway company, or that it ever entered into the mind of either party to the contract that the railway company would do so unusual a thing as to purposely break down or blow up the structure which was the subject of the contract and which it had so firmly bound itself to maintain. The majority seem to think that, because the deed was revocable for certain breaches of the contract, and because this provision was twice inserted and the provision in relation to liquidated damages was inserted but once, the first provision in some measure weakens the force and changes the otherwise obvious construction of the latter clause. I think there is nothing whatever inconsistent between the two provisions, and that the obligation to maintain, instead of being inconsistent, is a basis for the contract for liquidated damages. It can readily be seen that the main solicitude on the part of respondents was to be protected against an interference in any way with their logging operations. And according to the contract, if it appeared that the railway company was not taking the precautionary measures provided for, and danger to the operation of the logging business was threatened, it was within the power of the respondents to avert that threatened danger by revocation. That was only one of the

rights they had under the contract. But it was not their bounden duty to keep a surveillance over the railway company in this regard. They had the right of revocation, but they had the further right to compensation in case the bridge was not safely maintained and injury resulted. It seems to me that the plain provisions of the liquidated damage contract have been destroyed by a strained construction of the first provisions of the contract. I therefore dissent.

[No. 9305. Department One. April 10, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. MATILDA GREINER, *Appellant*.[1]

PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—OFFENSES—COMPLAINT—SUFFICIENCY. A complaint for practicing medicine without a license is sufficient where the acts constituting the offense are set forth in ordinary concise language without repetition in such manner as to enable a person of common understanding to know what was intended.

CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE. In a prosecution for practicing medicine without a license, it is not error that, on cross-examination of the prosecutrix, who was asked if the defendant took her temperature, the court refused to strike out the answer, "No she used a vibrator on me;" especially where the defendant later testified to having used a vibrator.

CRIMINAL LAW—INSTRUCTIONS—LEGAL EFFECT OF CHARGE. In instructions defining the charge of practicing medicine without a license, it is not error to state the legal effect of the complaint, rather than follow its language.

PHYSICIANS AND SURGEONS—PRACTICING MEDICINE—TREATMENT—EVIDENCE—SUFFICIENCY. Under the statute prohibiting any mode of treating the sick without first obtaining a license, a conviction is sustained where it appears that the defendant diagnosed the patient's ailments with the aid of a vibrator, used manual manipulations, prescribed a dietary, gave advice, and collected a fee.

STATUTES—TITLE AND SUBJECTS. An act prohibiting the practice of medicine without first obtaining a license, is not objectionable as

[1]Reported in 114 Pac. 897.

embracing more than one subject from the fact that it contains provisions affecting a variety of practitioners having different systems and methods of treatment.

CONSTITUTIONAL LAW—CIVIL RIGHTS—PRACTICE OF MEDICINE—REGULATION. An act prohibiting the practice of medicine without first obtaining a license is within the acknowledged powers of the state.

Appeal from a judgment of the superior court for King county, Yakey, J., entered July 5, 1910, upon a trial and conviction of practicing medicine without a license. Affirmed.

O. L. Willett and *Morris & Hartwell*, for appellant, contended, among other things, that aside from any limitations of our constitution, if the practice of the science of chiropractic could not be detrimental, it is not subject to regulation. *Nelson v. State Board of Health*, 22 Ky. Law 438, 57 S. W. 501, 50 L. R. A. 383; *County of Los Angeles v. Hollywood Cemetery Ass'n*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. 75; *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 114 Am. St. 114, 5 L. R. A. (N. S.) 674; *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952; *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 44 Am. St. 756, 15 L. R. A. 477; *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 75 Am. St. 93, 48 L. R. A. 261. The statute must have some relation to the legitimate ends of the police power, be appropriate for the results desired, and not unnecessarily harsh. *Ruhstrat v. People*, 185 Ill. 133, 57 N. E. 41, 76 Am. St. 30, 49 L. R. A. 181; *State v. Biggs*, 133 N. C. 729, 46 S. E. 401, 98 Am. St. 731, 64 L. R. A. 139; *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 35 Am. St. 152, 19 L. R. A. 727; *Lawton v. Steele*, 152 U. S. 133; *State v. Carey*, 4 Wash. 424, 30 Pac. 729. A legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. *Dobbins v. Los Angeles*, 195 U. S. 223; *California Reduction Works v. Sanitary Reduction Works*, 126 Fed. 29; *State v. Vandersluis*, 42 Minn. 129, 43 N. W. 789,

6 L. R. A. 119; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 28 Am. St. 185, 13 L. R. A. 481; *Iler v. Ross*, 64 Neb. 710, 90 N. W. 869, 97 Am. St. 676, 57 L. R. A. 895; *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *Millett v. People*, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; *Eden v. People*, 161 Ill. 296, 43 N. E. 1108, 52 Am. St. 365, 32 L. R. A. 659; *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664. At common law the healing sciences were open to all without restriction. *Denton v. State*, 21 Neb. 445, 32 N. W. 222; *State v. Morrill*, 7 Ohio Dec. 52. The arbitrary classification in question is void as a denial of the equal protection of the law. *Yick Wo v. Hopkins*, 118 U. S. 356; *State v. Jackman*, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438. The qualifications that can be required of any person to follow any profession lawful at common law, must relate to the person's fitness to practice that particular profession only. *Cummings v. Missouri*, 71 U. S. 277; *In re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; *State v. McKnight*, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; *State v. Mylod*, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428; *State v. Gravett*, 65 Ohio St. 289, 62 N. E. 325, 87 Am. St. 605, 55 L. R. A. 791; *Bennett v. Ware*, 4 Ga. App. 293, 61 S. E. 546; *Hayden v. State*, 81 Miss. 291, 33 South. 653, 95 Am. St. 471; *People ex rel. Nechamcus v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889. The title of the act does not embrace the practice of chiropractic; the only healing sciences specifically referred to are medicine, surgery and osteopathy. The rule of *ejusdem generis* is applicable. *State v. Herring*, 70 N. J. L. 34, 56 Atl. 670; *State v. Dinnisse*, 109 Mo. 434, 19 S. W. 92; *State v. National School of Osteopathy*, 76 Mo. App. 439. The rule of *ejusdem generis* is most strongly and appropriately applied in construing penal laws, and the courts are adverse to holding guilty those whose acts are not within the concluding general words. *Shirk v.*

People, 121 Ill. 61, 11 N. E. 888; *State v. Black*, 75 Wis. 490, 44 N. W. 635; *People v. Richards*, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. 373; *State v. Sumner*, 10 Vt. 587, 33 Am. Dec. 219; *McDade v. People*, 29 Mich. 49; *Nichols v. Poulson*, 6 Ohio 305.

George F. Vanderveer and *A. H. Lundin*, for respondent.

FULLERTON, J.—The code (Rem. & Bal. Code, § 8400) makes it a misdemeanor for any person to practice, or attempt to practice, or hold himself out as practicing, medicine and surgery, osteopathy, or any other system or mode of treating the sick or afflicted in the state of Washington, without having, at the time of so doing, a valid, unrevoked certificate from the board of medical examiners of the state entitling him so to do. On March 26, 1910, one Teresa Smith caused a complaint to be filed before a justice of the peace in King county accusing the appellant, under the name of Jane Doe Greiner, of practicing a mode of treatment of the sick and afflicted, known as chiropractic, without having, at the time of so doing, a valid, unrevoked certificate to practice such mode of treatment from the proper authorities. She was arrested on a warrant issued on the complaint, and thereafter tried for the offense set forth therein, and convicted. From the judgment of conviction, she appealed to the superior court of King county, where she was again tried and convicted. This appeal is from the judgment pronounced on the last mentioned conviction.

The appellant first complains of the complaint on which she was tried, arguing that it does not state facts sufficient to constitute a crime. But without entering into a particular analysis of its allegations, we think it sufficient. While it is not recommended as a model, it charges, in effect, that the appellant, at a time and place certain, did wilfully and unlawfully practice a mode of treatment of the sick known as chiropractic, without having a license therefor from the proper authorities, in that she did then and there prescribe,

direct, and recommend certain treatment for the cure and relief of certain bodily infirmities and diseases of the complaining witness. It is not necessary that the acts constituting the offense be set forth in the complaint with the technical precision required at common law. To use the language of the code, the complaint is sufficient if the acts constituting the offense be set forth therein in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. The complaint was thus definite.

On the examination of the complaining witness in chief, she gave a somewhat minute description of the treatment given her when at the office of the appellant, but made no mention of the use upon her of a mechanical instrument of any kind. On cross-examination to the question, "Did she take your temperature?" she answered, "No, she used a vibrator on me." The appellant moved to strike the latter part of the answer, and assigns error on the refusal of the court to grant the motion. This was not error. The answer recited a fact material to the inquiry, and it was proper to let the jury consider it, even though it appeared as a volunteered statement on cross-examination. But if the ruling were error, it was rendered harmless by the subsequent action of the appellant. She took the stand herself and testified to the use of a vibrator on the prosecuting witness.

The objection that the court erred in giving and refusing to give certain instructions is without merit. All that was proper or material in the instructions proposed were included in the court's charge, and while the court, in defining the charge against the appellant to the jury, stated the legal effect of the complaint instead of following its somewhat confused language, no error was committed thereby. It is the court's province and duty to make the case in hand clear to the jury, and the parties to the action have no right to complain because the language used in so doing is the court's language rather than that of the party requesting them.

It is contended that the evidence was insufficient to justify a conviction. The statute, it will be noticed, makes it an offense to practice any mode of "treating" the sick and afflicted, and the appellant testified that instead of using treatments for the ailments of the prosecuting witness, she used "adjustments," and hence is not guilty of any violation of the statute. But we think this is a mere play upon words. Her methods were fully described in the record, both by the prosecuting witness and by herself, and to our minds they fall as well within the definition of "treatment" as they do of "adjustment." She had the patient remove her street clothing, and put on a kimono; she diagnosed the patient's ailments with the aid of a vibrator; she manually manipulated the supposedly diseased parts; she prescribed a dietary for the patient; she collected a fee; and advised the patient to return for further manipulation. This, as far as our observation extends, does not differ materially from the methods of unlicensed practitioners generally who confessedly give treatments for the sick and afflicted.

It is finally objected that the act under which the appellant is prosecuted is unconstitutional. It is objected, first, that it embraces more than one subject, and second, that the science practiced by the appellant is not a subject for regulation by the legislature. Neither of these objections are well founded. The purpose of the act is to regulate the mode of treating the sick and afflicted, and the fact that it may contain provisions affecting a variety of practitioners, having different systems and methods of treating the sick, does not render it subject to the objection that it contains more than one subject. The science, if it be such, practiced by the appellant is clearly a mode of treating the sick and afflicted. As such it is, by all authority, subject to regulation. To call the method of treatment "chiropractic" and the treatments given "adjustments" does not change its nature. If the practice has any beneficial purpose at all its purpose is to heal the sick and afflicted, and to regulate the

practice of healing the sick and afflicted is unquestionably within the acknowledged powers of the state.

The judgment is affirmed.

DUNBAR, C. J., GOSE, and MOUNT, JJ., concur.

[No. 9246. Department One. April 10, 1911.]

F. E. ROSENBURG *et al.*, *Appellants*, v. FREMONT UNDERTAKING COMPANY, *Respondent*.[1]

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT. The prior use of the trade-name "Fremont Undertaker," at Fremont, precludes the adoption by another firm at the same place of the name "Fremont Undertaking Company," where confusion results therefrom.

SAME—RIGHTS OF ASSIGNEE—CHANGE OF NAME. Successors in interest acquire the right to change the trade-name "Fremont Undertaker" to "Fremont Undertaking Company," as against parties adopting a similar name.

SAME—ABANDONMENT. The right to the use of a trade-name employed by a firm is abandoned and lost, where, upon dissolution of the copartnership, the member succeeding to the business agreed to, and for a time did, discontinue its use.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 29, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to enjoin the use of a trade-name. Reversed.

Carkeek & McDonald, for appellants.

Morris, Southard & Shipley, for respondent.

FULLERTON, J.—This action was brought by the appellants against the respondent to enjoin the use of a trade-name. From the record it appears that in 1903 one M. O. Carton opened an undertaking establishment in the northern

[1]Reported in 114 Pac. 886.

part of the city of Seattle known as Fremont. In advertising his business he early began to use the words "Fremont Undertaker" sometimes placing the words immediately following his name, as "M. O. Carton, Fremont Undertaker," and sometimes using them as his business name, as "Fremont Undertaker; M. O. Carton, proprietor"; the latter form being the one principally adopted during the later years he continued in business. During this time, also, patrons would address mail matter pertaining to his business to him under the name of "Fremont Undertaking Company," and "Fremont Undertaking Co."

In 1905, some two years after Carton had established his business, one J. J. Bleitz opened an undertaking establishment in the northern part of Seattle, locating at Green Lake. In January, 1906, he formed a partnership with one Butterworth and removed the establishment to Fremont, a few blocks distant from Carton's business house, where they did business for some eight months under some three different names; namely, "Bleitz & Butterworth," "Fremont Undertaking Company," and "Fremont Undertaking Company; Bleitz & Butterworth," using the latter form more frequently, perhaps, than either of the others. After the opening of the second establishment, the parties immediately became business rivals, and owing to the similarity of the names used by them, much confusion resulted. Mail intended for the one would be delivered to the other, and sometimes persons desiring the services of the one concern would by mistake call on the other. Carton, during this time, remonstrated orally with Bleitz & Butterworth against the use of the name "Fremont Undertaking Company" in any form, and in the late summer of 1906, wrote them a letter threatening them with an action if they did not cease to use it.

On September 14, 1906, Bleitz & Butterworth dissolved their partnership, Butterworth selling his interests to Bleitz. In the articles of dissolution it was provided that "Bleitz agrees to discontinue the name of 'Fremont Undertaking Com-

pany; Bleitz & Butterworth,' heretofore used by said partnership, and to remove same from all signs, stationery and advertising as soon as possible." Bleitz, in compliance with this part of the agreement, commenced doing business under the name of "Bleitz Undertaking Company," changing all his signs and advertising matter to read in that way. Matters ran on in this way until August, 1908, Carton in the meantime continuing to use the name "Fremont Undertaker." On August 26, 1908, Carton sold his business to the plaintiffs in this action, appellants in this court. They immediately adopted the name of "The Fremont Undertaking Co.," and filed with the county clerk of King county a certificate setting forth such name as the firm name under which they proposed to conduct their business, as required by the statute of 1907, and from thence on used the name as their trade-name, and extensively advertised their business thereunder. On November 10, 1908, Bleitz, with certain associates, formed a corporation under the name "The Fremont Undertaking Company, Inc.," and the corporation thereafter took over the business theretofore conducted by Bleitz, and began doing business under the corporate name. Thereupon the appellants notified the corporation to discontinue using the name "The Fremont Undertaking Company, Inc.," or any similar name, and on its refusal so to do, began the present action to enjoin its use. The respondent, in its answer, claimed the better right to the use of the name, and on the trial the court held with it, enjoining the appellants from further using the name "Fremont Undertaking Company," or any similar name, in the conduct of their business. This appeal followed.

The right to use a particular name as a trade-name belongs to the one who is first to appropriate it and use it in connection with a particular business. To acquire the right to use a particular name it is not necessary that the name be used for any considerable length of time. In a contest between two individuals over such right, therefore, it is enough to show that the one was in the actual use of it before it was begun

to be used by the other. 28 Am. & Eng. Ency. Law (2d ed.), 395. It is a recognized principle, also, that a trade-name can be abandoned or given up by the original appropriator, and that when it is so abandoned or given up, any other person has the right to immediately seize upon it and make use of it, and thus acquire a right to it superior, not only to the right of the original user, but to all the world. *Gaines & Co. v. Whyte Grocery Fruit & Wine Co.*, 107 Mo. App. 507, 81 S. W. 648. Nor need one trade-name, in order to be an infringement upon another, be exactly like it in form and sound. It is enough if the one so far resembles the other as to deceive persons of ordinary caution into the belief that they are dealing with the one concern when they use the name of the other. For example, it was held in *Proctor & Gamble Co. v. Globe Refining Co.*, 92 Fed. 357, that it was an infringement upon the trade-mark "Every Day Soap" to use as a trade-mark "Everybody's Soap"; in *International Society v. International Society*, 59 N. Y. Supp. 785, it was held an infringement on the name "International Society" to use the name "International Society of Literature and Bookbinders' League"; in *Mossler v. Jacobs*, 66 Ill. App. 571, it was held an infringement upon the name "Six Little Tailors" to use the name "Six Big Tailors"; and in *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811, it was held an infringement upon the trade-name "Kalamazoo Wagon Company" to use the name "Kalamazoo Buggy Company." To the same effect are the following cases: *Fuller v. Huff*, 104 Fed. 141; *Hansen v. Siegel-Cooper Co.*, 106 Fed. 691; *Nokes v. Mueller*, 72 Ill. App. 431; *Volger v. Force*, 63 App. Div. 122, 71 N. Y. Supp. 209; *Morgan Envelope Co. v. Walton*, 82 Fed. 469.

Nor is the rule different because the name or some part of it may be a geographical name. The rule is not rested on the principle that the user has a property in a name, but on the principle that it is a fraud on both the person who has established a trade which he carries on under a given name,

and the public who trade with the person on the faith of the name, to allow another to assume the same or a similar name for the purpose of selling his own goods or inducing people to trade with him under the belief that they are purchasing the goods of, or trading with, the person who established the name. *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 110 Pac. 23.

"A corporation may be enjoined from using a name or conducting a business under a name so similar to the name of a previously established corporation, association, partnership, or individual, engaged in the same line of business, that confusion or injury results therefrom." *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 98 Pac. 1116.

Applying these principles to the case in hand, it would seem that the judgment of the trial court was erroneous. In the first place we think there was an infringement upon the trade-name "Fremont Undertaker," adopted by Carton, by the use of the name "Fremont Undertaking Company," adopted by Bleitz & Butterworth. There can be no question that Carton was the first to use the name "Fremont Undertaker," and that he was using it at the time Bleitz & Butterworth commenced business as partners. It would seem to be free from question also that the name adopted by the latter was sufficiently identical with the name adopted by Carton as to mislead persons of ordinary caution. And that persons were actually misled by the similarity of the names into trading with Bleitz & Butterworth when in fact they intended to trade with Carton, the record abundantly shows. It being, therefore, unfair competition for the firm of Bleitz & Butterworth to adopt the name of "Fremont Undertaking Company," they acquired no right therein by its adoption, and the successors in interest of Carton were free to change the form of the name adopted by Carton to that form when they succeeded to Carton's interests.

In the second place, the right to use the name of Fremont Undertaking Company by Bleitz & Butterworth, even con-

ceding that they acquired the right, was abandoned by Bleitz after he succeeded to the interests of Bleitz & Butterworth, and taken up by the appellant before the respondent sought to resume its use. It is true that Bleitz testified there was no intention on his part to abandon the use of the name entirely, but we think the fact can be better ascertained by his acts at the time than by his present statements. He agreed in writing with his former partner to abandon its use, and did in fact quit its use until after it was taken up by the appellants. While we think a secret intent on his part to again resume the name would not be sufficient against one who actually took up its use, there is here evidence of intent to abandon, as well as actual abandonment.

The judgment appealed from is reversed, and the cause remanded with instructions to enter a decree in favor of the appellants enjoining the respondent from further using in connection with its business the name "Fremont Undertaking Company, Inc." or any similar name.

DUNBAR, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9219. Department One. April 10, 1911.]

GEORGE D. WILLIAMS *et al.*, *Respondents*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

RAILROADS—CROSSINGS—FLYING SWITCH IN CITY—NEGLIGENCE—QUESTION FOR JURY. The negligence of a railway company in making a flying switch, in a city, is a question for the jury, where the switched cars were on a down grade on a spur track running nearly parallel to a sidewalk until it crossed the walk at an angle, there was considerable noise in the vicinity preventing a person from hearing a warning shout, and control of the cars by hand brakes was more than ordinarily difficult.

SAME—CONTRIBUTORY NEGLIGENCE. A girl, fourteen years of age, who was run down on a city crossing by cars on a spur track, started down grade on a flying switch, is not guilty of contributory negli-

[1]Reported in 114 Pac. 888.

gence as a matter of law from the fact that she did not look back after she was within ten or twelve feet from the crossing when the cars were sixty feet away approaching from the rear.

Appeal from a judgment of the superior court for Whitman county, Canfield, J., entered June 24, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

Edward J. Cannon, George M. Ferris, Charles E. Swan, and *Thomas A. E. Lally,* for appellant.

Robertson & Miller and *Harry Rosenhaupt,* for respondents.

PARKER, J.—This is an action for damages, alleged by the plaintiffs to have resulted to them from the negligence of the defendant in switching cars upon its tracks at Pullman on October 29, 1906, thereby causing the death of their daughter. The defendant denied the negligence charged against it, and as a defense charged contributory negligence on the part of the daughter. The trial resulted in a verdict and judgment in the plaintiffs' favor. The defendant has appealed.

There is here involved only the alleged error of the trial court in denying appellant's motion for a directed verdict, and for judgment notwithstanding the verdict. The problem for our solution is, Can the cause be decided as a matter of law in appellant's favor upon the question of its negligence, or upon the question of the daughter's contributory negligence?

The appellant owns and operates a line of railway running north and south through Pullman. Grand street in Pullman adjoins the railway on the west. The sidewalk on the west side of the street runs almost parallel with the railway. There is a spur track turning off from the main line which runs across the street in a southwesterly direction to some warehouses located some distance west of the street. From the point where the spur leaves the main line to the sidewalk

on the west side of the street, the distance is about 65 feet, and from the point where the spur crosses the sidewalk on the west side of the street to the main line of the railway, the distance is about thirty-nine feet. There is nothing to obstruct the view at any point between the sidewalk and the main line of the railway along this part of the street. From the point where the spur leaves the main line, measured along its course to where it crosses the sidewalk on the west side of the street, the distance is about 190 feet. The spur crosses the sidewalk in a southwesterly direction at an angle of less than forty-five degrees, though the larger part of the spur between that point and the main line is much nearer parallel to the sidewalk than that angle would indicate. So if a person was walking south on the sidewalk and near to the crossing, and a car or train was approaching the crossing over the spur, it would, in a sense, be approaching such person from the rear, unless it was as near or nearer to the crossing than the person. From the point where the spur leaves the main line of the sidewalk crossing, its grade descends at an average rate of about one and one-half per cent.

About half past 8 o'clock on the morning of October 29, 1906, the daughter of respondents, who was then but little past fourteen years of age, was walking south on the sidewalk on the west side of the street on her way to school. She was apparently somewhat absorbed in reading a book. Just as she reached the crossing of the spur track, two cars, without any engine attached, which had been switched off the main line, approached from that direction at a speed of six or eight miles an hour, and ran over her, resulting in her death. This spur was used by appellant on an average of about once a day, or possibly a little oftener during the fall months, and at other times of the year it was used much less. The daughter had been passing over this sidewalk and over this crossing daily on her way to and from school for several months. At the time of the accident, these cars had been switched off the main line onto the spur by a flying switch.

The engine pulling the cars and running from the north to south upon the main line was detached just before reaching the switch, when its speed was accelerated, carrying it over the switch, and the switch then turned allowing the cars to pass onto the spur. At this point the speed of the cars was about four or five miles per hour, and their speed was increased by the down grade of the spur so as to become six or eight miles per hour at the crossing.

There is some conflict in the evidence as to whether there were two or three cars, and as to where the brakeman was standing on top of them. But we will assume that there were only two cars, and that the brakeman was very near the front end on top of the first car, as claimed by appellant. The brake of the front car was at the rear end, so the brakeman was not near it. No other person was on either car. There was another engine besides the one which had made the switch, near there, and there was some noise going on, such as is usual in such places. Just what notice the daughter had taken of her surroundings while approaching the crossing and before she got near to it, is not shown. The jury was asked, and answered, a special interrogatory as follows: "Q. Did she look in the direction from which the cars were approaching before stepping upon the spur track? A. No." The brakeman on the front car first noticed her when she was about ten or twelve feet from the crossing, and seeing she was apparently absorbed in her book, and about to go upon the track, he halloed, "Look out." The cars were then about sixty feet from the crossing. About this time another person over on the main line halloed in a similar manner. She paid no attention to these warnings, seeming not to hear them, or if she did, seeming not to understand they were warnings to her. By this time the cars had approached to within about thirty feet, when the brakeman ran to the brake at the rear end of the car, and did not see her again until after she had been run over. She noticed the approach of the car when she had gotten upon the track, and tried to escape, but it was

then too late. The front end of the front car passed about 100 feet beyond the crossing before it could be stopped by the brakeman. It appears from the evidence to be somewhat doubtful as to whether or not the cars could have been stopped by the brakeman before reaching the crossing, even had he commenced to do so immediately after leaving the switch, because of the down grade. There was some evidence tending to show the experience and intelligence of the daughter, but we do not regard that she was thereby shown to be a girl of materially different experience or intelligence from other children of her age.

Referring first to the negligence of appellant, we think these facts are clearly sufficient to require the submission of the question of its negligence to the jury, and that such question could not be decided in appellant's favor as a matter of law. The undisputed evidence not only shows that the flying switch was made by appellant's servants, but that it was made by throwing cars upon a spur running down grade where their control by the hand brakes alone was rendered more than ordinarily difficult. This was clearly sufficient to establish the negligence of appellant. *Kentucky Central R. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 63, and note.

The principal contention of learned counsel for appellant is that the daughter was guilty of contributory negligence, and that the court can so decide upon this record as a matter of law. We have seen that the daughter was but little over fourteen years old. There is no evidence that she did not look and listen, except that she did not do so after she had gotten from ten to twelve feet from the crossing. The special finding cannot mean more than this. She may have done so before that and become satisfied that there was no danger to be apprehended from cars upon the spur. If she had looked back but a moment before that time and even saw the cars some distance back upon the switch without any engine attached to them she might have mistakenly supposed they were upon the main line. Even when she was twelve feet

from the crossing the cars were sixty feet away. They approached her practically from the rear on a down grade at increasing speed with no engine attached to assist in controlling them, or to give the usual warning by bell or whistle as they approached the crossing. It seems to us, in view of all of these facts, reasonable minds might differ as to whether or not she acted as prudently under the circumstances as a girl of her age, intelligence and experience would ordinarily act under such circumstances. This, we think, renders the question of her contributory negligence one for the jury, and it cannot be decided as a matter of law. *Boyer v. Northern Pac. Coal Co.*, 27 Wash. 707, 68 Pac. 348; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855; *Alabama & Vicksburg R. Co. v. Summers*, 68 Miss. 566, 10 South. 63.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 9318. Department One. April 10, 1911.]

I. B. WINSOR, *Plaintiff and Appellant*, v. COMMONWEALTH COAL COMPANY *et al.*, *Defendants and Respondents*, R. L. MCCORMICK *et al.*, *Defendants and Appellants*.[1]

ATTORNEY AND CLIENT—DEALINGS BETWEEN—FRAUD—EVIDENCE—SUFFICIENCY. The evidence sustains findings that attorneys did not overreach a client in entering into a contract whereby half of his stock in a mining corporation was turned over to the attorneys in consideration of their raising the funds to pay off the indebtedness and finance the concern, the other half of his stock to be held under a pooling agreement, where the client owned the majority of the stock, the concern was in the hands of a receiver, there was no market for the stock and no other way to pay off the indebtedness, and the client made the proposition with full knowledge of the facts and was fully competent to attend to business.

[1]Reported in 114 Pac. 908.

CORPORATIONS—MANAGEMENT—EMPLOYMENT OF STOCKHOLDER—DISCHARGE. A stockholder transferring stock in consideration of an agreement that he be employed as sales agent may be discharged from such position for inefficiency.

USURY—WHO MAY RAISE OBJECTION. The objection that the giving of stock to persons who advanced money for loans to the corporation amounted to usury cannot be urged by a person who was not interested in the transaction or stock.

CORPORATIONS—MANAGEMENT—POOLING STOCK—VALIDITY OF CONTRACT—PUBLIC POLICY. A pooling contract for the voting of corporate stock is not void as against public policy, because of provisions in the agreement relating to the employment of an agent and the election of a director, where there was no fraud and nothing unlawful about it and nothing which necessarily affected the rights of minority stockholders.

Cross-appeals from a judgment of the superior court for Pierce county, Shackleford, J., entered August 8, 1910, in favor of certain defendants, after a trial on the merits before the court without a jury, in an action on contract. Modified.

Sullivan & Christian, *Gordon & Askern*, and *Higgins, Hall & Halverstadt*, for plaintiff I. B. Winsor and defendant Richard Winsor.

Jas. F. McElroy, *Hayden & Langhorne*, and *Bates, Peer & Peterson*, for defendants McMurray, McCormick and Stevenson.

MOUNT, J.—The plaintiff brought this action to annul a contract entered into by himself and Newton H. Peer, and to annul all contracts made by Bates, Peer & Peterson pursuant to the original contract, upon the ground that Bates, Peer & Peterson were attorneys for the plaintiff at the time the original contract was made, and that they overreached the plaintiff, and that after they and their associates had obtained possession of the property described in the contract, they mismanaged the same so that it was in imminent danger of being wholly lost. The defendants admitted the contract, but denied all the allegations upon which an annulment was based.

Upon a trial of the case, the court concluded that Bates, Peer & Peterson, at the time the contract was made, were attorneys and confidential advisers of the plaintiff, and "the contract being in effect between attorneys and their clients, the burden rests upon the attorneys to show the fairness of the agreement," and "the evidence shows that the amount of compensation provided for in the agreement was just, fair and proper, and it was the purpose of the attorneys in making the contract to deal fairly with their client." The court also found that the attorneys had fully executed the agreement, and that the provisions in the contract relating to the retention of the plaintiff as a trustee of the corporation, and in regard to the employment of the plaintiff as a sales agent, were against public policy and void; and for that reason concluded that the plaintiff had a right to rescind the provisions of the contract relating to the pooling of plaintiff's stock. A decree was thereupon entered, to the effect that defendants Bates, Peer & Peterson and their associates retain 355,000 shares of the stock of the Commonwealth Coal Company, and that new certificates for 336,589 shares be made out in the name of the plaintiff and deposited with the defendant Scandinavian American Bank, to be held by it under an agreement for collateral security for a debt owing to the bank, and secondarily to secure a claim of defendant Richard Winsor; also that, out of the stock adjudged to defendants Bates, Peer & Peterson and their associates, 18,411 shares be held subject to the claim of said Richard Winsor, and that the pooling agreement be adjudged void, in so far as it affected the stock awarded to plaintiff as above stated. The plaintiff has appealed from that part of the decree denying the relief prayed for, and the defendants McCormick, McMurray and Stevenson have appealed from that part of the decree rescinding the pooling agreement.

The record of the case is very voluminous, but the salient facts are briefly stated as follows: It appears that, prior to December, 1909, the plaintiff owned the majority of the cap-

ital stock of the Commonwealth Coal Company, a corporation organized under the laws of this state. This corporation was engaged in operating coal mines. The defendants C. O. Bates, N. H. Peer and C. T. Peterson had been retained as attorneys for the Commonwealth Coal Company, and had frequently advised the plaintiff in regard to the business of this and other corporations in which the plaintiff was interested. In the summer of 1909, the Commonwealth Coal Company became embarrassed financially, and was unable to meet its maturing obligations. The plaintiff had unsuccessfully endeavored to dispose of his personal stock in order to raise funds with which to carry on the business of the corporation. The plaintiff owned 710,000 shares of the capital stock of the Commonwealth Coal Company, capitalized for 1,000,000 shares. This company, on December 8, 1909, was in the hands of a receiver because of its inability to meet its monthly pay roll. On that date the plaintiff entered into an option contract, by which he agreed to sell 510,000 shares of his stock in the Commonwealth Coal Company to one A. C. Marconnier, in consideration that the latter would pay $43,000 indebtedness of said company. This contract was to be accepted by ten o'clock the next morning. It was not so accepted. Whether Marconnier changed his mind, or whether plaintiff changed his mind, is not clear. At any rate the contract was not carried out. Thereupon the plaintiff solicited his attorneys, Bates, Peer & Peterson, to assist him to finance the company, in order to get the same out of the hands of the receiver. After some negotiations, the contract in question was entered into as follows:

"Memorandum of Agreement, made and entered into this 11th day of December, A. D. 1909, by and between I. B. Winsor, party of the first part, and Newton H. Peer as trustee, party of the second part:

"Witnesseth: That whereas the party of the first part is the owner of seven hundred ten thousand (710,000) shares of the capital stock of the Commonwealth Coal Company, a

corporation duly organized and existing under and by virtue of the laws of the state of Washington of the par value of one dollar ($1) a share;

"And whereas the said I. B. Winsor is president of said Commonwealth Coal Company, and whereas the said Commonwealth Coal Company is indebted to divers and sundry persons in the sum of approximately forty-five thousand dollars ($45,000) of which sum about five thousand dollars ($5,000) is for the October pay roll of said corporation, which is now past due, and for which a lien has been filed; and whereas there will be due to the laborers in the mines of said corporation the November pay roll amounting to about eight thousand dollars ($8,000) on the 20th day of December, A. D. 1909; and whereas the said Commonwealth Coal Company and the party of the first part are without funds with which to liquidate said amounts due on said payrolls and the other indebtedness;

"And whereas they are desirous of obtaining the necessary funds to liquidate said indebtedness, and whereas the said party of the first part is the owner of more than a majority of the capital stock in said Commonwealth Coal Company, and whereas most of the capital stock of said Commonwealth Coal Company owned by the party of the first part is now hypothecated with the creditors of said company, as security for the payment of said indebtedness.

"Now, therefore, it is mutually understood and agreed between the parties hereto, as follows: The party of the first part, in consideration of the covenants and agreement hereinafter set forth to be performed on the part of the party of the second part, agrees as follows: That he will and does hereby transfer and set over unto the party of the second part three hundred fifty-five thousand (355,000) shares of the capital stock of the Commonwealth Coal Company, to be held and owned by the said party of the second part; and that he will deposit the balance of said capital stock owned by him, to wit, three hundred fifty-five thousand (355,000) shares, with the party of the second part, to be pooled by the party of the second part with the stock owned by him, under a pooling agreement that the party of the second part shall vote at all stockholders' meetings all of said stock, to wit, three hundred fifty-five thousand (355,000) shares, owned by the said I. B. Winsor, either in the election of a board of trustees

or officers or for any other purpose for which said stock shall be voted, it being distinctly understood and agreed, however, that the title to the said three hundred fifty-five thousand ($355,000) shares, so deposited with the party of the second part by the party of the first part under said pooling agreement, shall be and remain in the party of the first part, subject only to the terms of said pooling agreement. It is further understood and agreed that all of said stock be transferred to the party of the second part under the terms of this agreement subject only to the rights of the party with whom said stock is now hypothecated. And the said party of the second part, for and in consideration of the covenants and agreements to be performed by said party of the first part as herein set forth, agrees to at once advance to the Commonwealth Coal Company sufficient money to pay the October payroll of the Commonwealth Coal Company, and also on or about the 20th day of December, A. D. 1909, advance to said Commonwealth Coal Company, sufficient money to pay the November payroll of said Commonwealth Coal Company, or so much thereof as may be necessary to take care of said November payroll. The said party of the second part further agrees to advance at once any further sum necessary, not exceeding the sum of thirty-five hundred dollars ($3,500), to pay and take care of any floating indebtedness or liability of said Commonwealth Coal Company that it is necessary to pay at this time. It is further understood and agreed that the said I. B. Winsor shall resign his office as president of said Commonwealth Coal Company, and the vacancy caused by said resignation shall be filled by some party that is elected by the party of the second part or his associates, provided however, that the said I. B. Winsor shall be retained on said board of trustees and shall be retained on said board of trustees during the continuance of this agreement. It is further understood and agreed that as soon as practicable the mines of the Commonwealth Coal Company shall be opened and put in active operation and the profits derived from the sale of the product of said mine, after paying all running expenses and fixed charges and such betterments as the board of trustees of said Commonwealth Coal Company shall direct, shall be applied to the payment of the said indebtedness owing by the Commonwealth Coal Company in such manner and in such a way as the board of trustees may designate. It is further understood and agreed that the

said I. B. Winsor shall be appointed salesman of the produce of said mine. It is further understood and agreed that the party of the first part shall obtain the resignation of the following named trustees of said Commonwealth Coal Company: George H. Tarbell, John W. Phillips, W. H. Pringle, and Corwin S. Shank, or any three of the same, and the vacancies caused thereby shall be filled by the said party of the second part or his associates. I. B. Winsor

"Newton H. Peer, as Trustee."

This contract was, in fact, the contract of Winsor and Bates, Peer & Peterson. It was dictated in the presence of the plaintiff, and contained the offers made by the plaintiff to his attorneys at the time it was made. It was not signed until the 13th or 14th of December. At the time this contract was entered into, the corporation was in the hands of a receiver, and all of the stock mentioned was held by the Scandinavian American Bank as collateral security for debts owing to the bank by the coal company and by the plaintiff. The plaintiff thereupon gave to Peer an order on the bank for the stock mentioned in the contract. It was estimated by the parties to the contract that $30,000 would be sufficient to pay off the pressing debts and take the company out of the hands of the receiver. Bates, Peer & Peterson thereupon solicited certain of their friends to loan money to the Commonwealth Company, promising them that the money would be repaid within a few months; and as an inducement to them to make the loan, promised that all the stock should be placed in a pool for ten years in order that they might control the company, and that persons loaning money should share in the stock given to Bates, Peer & Peterson by the contract. Under these promises the defendants loaned money to the coal company, and advanced the same to Mr. Peterson as follows: R. L. McCormick, $8,000; J. L. McMurray, $15,000; N. H. Peer, $2,250; C. T. Peterson, $2,250; George Stevenson, $2,250; making a total of $29,750. Mr. Peterson took this money and, in company with the plaintiff, went to the mine, where $17,068.79

was used in paying labor claims for the mining company. The balance was turned over to the treasurer of the company.

At the time these labor claims were paid, Mr. Peterson had no security from the company for this money. He thereupon had the claimants assign their claims to him, the plaintiff being present and assisting in making the payments and in taking these assignments. The receiver was subsequently discharged, and the new stockholders proceeded to reorganize the company by electing themselves and the plaintiff directors thereof. Upon this being done, application was made to the Scandinavian American Bank to release the capital stock held as collateral security as above stated. A new contract was then entered into by the bank and the coal company, acting through its new officers, by which contract a part of the debt owing to the bank was paid and time was given upon the remainder. The bank, however, upon being informed that the plaintiff, I. B. Winsor, was retained upon the board of directors, refused to execute the new contract or release any of the stock held by it, until the plaintiff was without authority in the management of the company. The plaintiff thereupon agreed to retire from the board of directors temporarily until the debt owing to the bank was paid, but that such retirement should not alter the other terms of the contract with Mr. Peer—the contract in question. Thereupon the bank released 475,589 shares of stock, the greater part of which it was agreed by the contract should belong to Bates, Peer & Peterson. Two hundred thousand of these shares were then divided between all the parties who had advanced money, according to the amount each one had advanced, and upon a basis of sixteen cents per share. It was soon necessary for the company to have more money, and $15,000 more was loaned to the company by the same parties who had advanced the $29,750, as above stated. These parties thereupon insisted that Bates, Peer & Peterson should, on account of this new loan, divide the 355,000 shares held by them. They thereupon consented, and taking one-half thereof to themselves, divided the other

half among the parties who had advanced the last loan, according to the amount advanced by each. Thereafter the plaintiff, who had been employed as sales agent for the company, was discharged for inefficiency. Subsequently interest on the bonded indebtedness of the mine became due and was not paid, but so far as disclosed by the record, no foreclosure proceedings were instituted.

It is conceded that the defendant Richard Winsor has a secondary lien for about $40,000 on the stock held by the bank. There is no evidence that the coal company had been improperly managed by the new board of directors. The whole record shows, that the plaintiff was fully advised and knew of all the conditions of the contract which he seeks to have declared void; that he was fully informed and knew what Bates, Peer & Peterson were doing with the stock. We find nothing worthy of notice to the effect that Bates, Peer & Peterson overreached the plaintiff, or of any bad faith on their part. On the other hand, the great weight of the evidence shows that they did what the plaintiff desired them to do, and at all times kept faith with the plaintiff. It was specifically agreed that they should have 355,000 shares, to be held and owned by them for their work. It is extremely doubtful if this stock at that time had any real value. It is true that Bates, Peer & Peterson divided this stock among the persons loaning the money, at the rate of sixteen cents per share, but there was no market for it at that time at such price, or at any other price, and there is no evidence in the record as to the value after that time. It is true there is a statement of assets and liabilities of the Commonwealth Coal Company which shows assets largely in excess of the liabilities, but there is nothing to show that this statement is correct, or even approximately so, in regard to the assets. But if the stock was valuable, the plaintiff knew that fact much better than any one else, and it was his proposition to give that stock to his attorneys as compensation for their work. There was some effort made to show that the plaintiff was worried and thereby

unfit to attend to business transactions. He was no doubt worried, but he was fully competent to attend to his business, and knew his business at all times, and particularly when he entered into the contract in question.

It is argued by the plaintiff that the contract contained illegal provisions and was therefore void, as follows:

"(1) That Peer as part consideration for the transfer should vote the plaintiff's stock; (2) that plaintiff should be retained on the board of trustees during the life of the agreement; (3) that the plaintiff should be appointed salesman of the produce of the mine; (4) that plaintiff should secure the resignation of three of the trustees and the vacancies be filled by Peer and his associates."

The first and fourth provisions named above were for the benefit of the persons whom Bates, Peer & Peterson should interest in the company, and the second and third provisions were for the benefit of the plaintiff. We know of no rule of law which prevents one person from authorizing another to vote his stock. The code provides that this may be done. Rem. & Bal. Code, § 3686. The plaintiff himself, after the contract had been executed and before the action was brought, expressly waived his right to be retained on the board of trustees. The plaintiff was appointed as sales agent, and served in that capacity for several months, and until he became inefficient; and he certainly was liable to be discharged for such cause. The vacancies were made on the board of directors. Even if the contract was illegal and therefore might not have been enforced in the particulars named, the provisions for the benefit of the plaintiff were actually performed or waived. The plaintiff, therefore, has no cause for complaint upon that account.

The plaintiff also argues that the giving of the stock by Bates, Peer & Peterson to the parties who advanced the money for the loans constituted usury. We think there was no usury in this. The stock given out actually belonged to Bates, Peer & Peterson at the time. They certainly could

dispose of it as they saw fit. But if the giving out of this stock by Bates, Peer & Peterson did constitute usury, the plaintiff may not urge that question in this case, for he is not interested. We think the record shows that the contract sought to be avoided was fairly entered into, and was executed by the defendants Bates, Peer & Peterson in good faith.

This contract, in regard to pooling the stock, is as follows:

"That he [plaintiff] will deposit the balance of said capital stock owned by him, to wit, three hundred fifty-five thousand (355,000) shares, with the party of the second part, to be pooled by the party of the second part with the stock owned by him, under a pooling agreement that the party of the second part shall vote at all stockholders' meetings all of said stock, to wit, three hundred fifty-five thousand (355,000) shares, owned by the said I. B. Winsor, either in the election of a board of trustees, or officers, or for any other purpose for which said stock shall be voted."

The trial court rescinded this provision of the contract, upon the ground that the two provisions relating to the retention of the plaintiff as a member of the board of trustees and his employment as sales agent were against public policy. If these provisions were against public policy, it does not necessarily follow that the pooling agreement was also void or against public policy. This pooling agreement was made by the plaintiff, who at that time owned a majority of all the stock of the corporation. He made it for his own protection, and also for the protection of those who might thereafter acquire stock. Under this provision of the contract, the defendants Bates, Peer & Peterson, with the knowledge and acquiescence of the plaintiff, entered into a ten-year pooling agreement with minority stockholders, who acquired stock upon the assurance that the stock should remain in the pool and not be offered for sale except to each other for that length of time, and that the plaintiff's stock should be voted by Mr. Peer. There appears to be nothing unfair or fraudulent in this agreement. Bates, Peer & Peterson acquired their stock under this agreement, and the defendants McCormick, Mc-

Murray and Stevenson acquired stock from Bates, Peer & Peterson, relying upon this provision of the contract. In fact, their testimony shows that, without such agreement, they would neither have loaned their money nor accepted the stock. It is therefore apparent that this provision of the contract should not now be rescinded, unless it is contrary to public policy or in some way tainted with fraud. The agreement to pool the stock was not against public policy, because there was nothing unlawful about it and nothing which necessarily affected the rights of minority stockholders. Persons owning stock have the unqualified right to combine their interests to secure the management of the corporation when such management is fair to all stockholders alike. *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24; *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 47 Pac. 582, 56 Am. St. 119, 35 L. R. A. 309; *Weber v. Della Mountain Min. Co.*, 14 Idaho 404, 94 Pac. 441; *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638. If this agreement had been made for the purpose of depriving some stockholder of his rights in the company, or of doing some other illegal act, a different rule would apply. But this contract seems to have been entered into for legal purposes and in good faith, and has been acted upon. The plaintiff is not now in a position to seek its rescission.

The judgment of the lower court is therefore modified, in so far as it rescinds the provision relating to the pooling agreement, but in all other respects it is affirmed; defendants to recover costs.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 8956. Department Two. April 10, 1911.]

MORRIS-MILLER COMPANY, *Respondent*, v. A. VON PRESSENTIN, *Appellant*.[1]

BANKS AND BANKING—CHECKS—DEPOSIT FOR COLLECTION—TITLE. A customer's indorsement of a check without restriction, and its deposit with credit subject to check, does not pass the title to the bank, where there was an understanding and custom that the bank was to receive it for collection and charge it back to the customer if dishonored.

BANKS AND BANKING—DEPOSITS—PAROL EVIDENCE OF CONDITIONS—COMPETENCY. Evidence is competent to show that the delivery and indorsement of a check to a bank by a depositor, without restriction, is in fact conditional, and for the purpose of collection without passing title, under Rem. & Bal. Code, § 3407, so providing as to the delivery of an indorsed instrument which has not come into the hands of a holder in due course.

BANKS AND BANKING—CHECKS—FAILURE TO COLLECT—NEGLIGENCE—NOTICE TO DRAWER. Where a depositor was put upon notice of the failing condition of his bank, was reducing his deposits, and knew that it could not obtain funds to meet its obligations, he is not injured by, and cannot complain of, negligence in the failure to notify him of nonpayment of a check which he had drawn and sent to another city, whereby several days would elapse before any steps could be taken to collect the check, during which time he learned of the dishonor at a time when the bank had sufficient cash to pay it, but made no attempt to protect himself either by insisting upon payment of the check or withdrawing the deposit, and the bank was insolvent.

SAME—EVIDENCE OF NEGLIGENCE—BURDEN OF PROOF. In an action by the drawer of a check to charge the payee with negligence in failing to collect it, the burden is upon the plaintiff to prove that the drawee was solvent and the claim good and collectible.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered January 28, 1910, upon findings in favor of the plaintiff, upon withdrawing the case from the consideration of the jury, in an action on contract. Affirmed.

Million, Houser & Shrauger, for appellant.

Coleman & Fogarty, for respondent.

[1]Reported in 114 Pac. 912.

Crow, J.—On November 4, 1907, the defendant, A. Von Pressentin, of Skagit county, being indebted to plaintiff, Morris-Miller Company, a corporation, of Tacoma, delivered to plaintiff his check for $343.18, drawn on the private bank of A. W. Schafer & Company, at Hamilton, Washington. Respondent indorsed the check, "Pay to order of Pacific National Bank, Morris-Miller Company, C. L. Morris," deposited it with the Pacific National Bank of Tacoma, and received credit therefor, subject to check, with the understanding that the bank was to receive it for collection and charge it back to respondent if dishonored. The Pacific National Bank promptly forwarded the check for collection to A. W. Schafer & Company, drawee, the only bank at Hamilton. The check could not reach Hamilton and be presented for payment until November 6, 1907. The defendant had sufficient funds on deposit with A. W. Schafer & Company to meet the check, but that bank, instead of honoring the check, laid it aside until November 15, 1907, when a receiver took charge of A. W. Schafer & Company, found the dishonored check, returned it through the Pacific National Bank to plaintiff, who transmitted it to defendant. Upon defendant's refusal to make other payment, plaintiff commenced this action, not upon the check, but to recover defendant's original indebtedness. The defendant pleaded payment, and negligence of the Pacific National Bank in failing to exercise diligence in collecting the check. From a judgment in plaintiff's favor, the defendant has appealed.

At the close of respondent's evidence, appellant moved for a nonsuit, contending that the Pacific National Bank of Tacoma was owner of the check, that the dispute was between it and appellant, and that respondent was not the proper party plaintiff. This motion was denied, and at the close of all the evidence, respondent's motion for judgment was granted. Appellant contends the trial court erred in refusing the nonsuit, and in entering judgment for respondent. There is no serious dispute as to the facts. After the Pacific National Bank

transmitted the check to A. W. Schafer & Company, and had received no report, it promptly followed the check with a tracer or letter of inquiry, but heard nothing further until the receiver was appointed. From November 4, 1907, the day the check was issued, until the appointment of the receiver, A. W. Schafer & Company had, at the close of each day's business, available cash as follows: November 4, $559.47; November 5, $518.87; November 6, $448.83; November 7, $392.63; November 8, $321.58; November 9, $151.87; November 11, $208.02; November 12, $466; November 13, $571.95; and November 15, $634.58. Other obligations of the bank were past due and unpaid.

On November 15, 1907, A. Von Pressentin, the appellant herein, as plaintiff, commenced an action in the superior court of Skagit county, wherein A. W. Schafer, doing business as A. W. Schafer & Company, was defendant, and in that action the receiver was forthwith appointed upon his application. A. W. Schafer & Company was a private bank, owned and conducted by A. W. Schafer. Appellant in his complaint, seeking the appointment of a receiver, alleged that as a depositor he was a creditor of the bank to the extent of $1,000. Other allegations of his complaint show the bank was insolvent, and that appellant, before demanding a receiver, knew the bank was dishonoring, and unable to pay, checks drawn by its depositors. Appellant testified that, before he applied for the receiver, he was informed that his check issued to respondent was at the bank unpaid and dishonored. On learning this fact, he made no effort to save himself, although the bank then had more available cash than it had at any other date after the check was issued. No evidence was offered to show, that at any time after appellant's check was given to respondent the bank was solvent; that it was paying checks of depositors; that it was doing a general banking business, although it remained open; or that it was able to pay checks actually drawn by its depositors when the same were presented. The respondent

offered evidence that other checks of its depositors had been presented to the bank and dishonored, but upon appellant's objection, the most of this evidence was excluded.

Appellant insists that the Pacific National Bank owned the check at all times after it was indorsed and deposited by respondent. There is much conflict of authority on this question, but in consideration of the usual business methods prevailing between respondent and the Pacific National Bank, their understanding that the check was deposited for collection only, although indorsed without restriction, and their agreement that, if dishonored, it was to be charged back and returned to respondent, all shown by the evidence, we conclude that the Pacific National Bank never became its owner. In pursuance of this custom, understanding, and agreement, the dishonored check was actually charged back, returned to, and accepted by, respondent without objection. Although there was no restriction in the form of the indorsement, the undisputed evidence shows that, as between the Pacific National Bank and respondent, the indorsement was in fact a restrictive and conditional one. Such evidence was competent. Section 3407, Rem. & Bal. Code, the same being § 16 of the negotiable instruments act of 1899, provides that delivery of an indorsed instrument, which has not come into the hands of a holder in due course, may be shown to have been conditional, for a special purpose only, and not made to transfer property in the instrument.

"Checks deposited and credited as cash do not become the property of the bank, so that it takes the risk upon itself even though the depositor has been allowed to check against the deposit before the paper is collected, and the depositor can recover the check or other paper, if it is still in the possession of the depositor. When a depositor deposits a check *on another bank*, without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it. If the deposit is made and credited to cover an overdraft, or is drawn upon, the bank can hold the paper

until the account is squared, but the property is in the customer. It is said that indorsement of the check to the bank, and credit on the books of the bank and on the pass-book, are evidence of a contract by which the bank shall become owner of the paper; but (1) banks always claim and *exercise the right of charging to the depositor all such checks returned unpaid, which is not consistent with the theory of an understanding that title passes absolutely.* (2) The practice of allowing depositors to check against such paper is reckoned by the ablest text-writers as a mere gratuitous privilege." 2 Morse, Banks & Banking (4th ed.), § 586. See, also, 5 Cyc. 493, and cases cited.

"Neither the deposit of a check with a bank for collection, nor the entry on its books of the amount of the check as a deposit of money in favor of the owner of the check, nor yet the negligence of such bank in and about the collection of the check from the drawee bank whereby there is a failure to collect it, nor all these facts combined, makes such check the property of the collecting bank, nor the owner of the check a depositor of the money entered to his credit, in such sense as gives him a right of action for money had and received, or otherwise, for the amount of the face of the check as money due him from the bank. A bank which receives a check for collection and enters the face value of it as a deposit credit to its owner, becomes the agent of the owner to collect it. If the collection is made, the relation of depositor and banker is consummated. If the collection is not made, the bank's right to charge off the deposit arises." *Jefferson County Sav. Bank v. Hendrix*, 147 Ala. 670, 39 South. 295, 1 L. R. A. (N. S.) 246, 250.

Appellant further contends that the respondent, through the Pacific National Bank, its collection agent, was negligent (1) in sending the check directly to the bank of A. W. Schafer & Company for collection, thereby constituting the drawee an agent to collect from itself, and (2) in failing to promptly notify appellant that the check had not been paid upon presentation to the drawee. The undisputed evidence shows that the bank of A. W. Schafer & Company was the only bank in Hamilton, and that when a bank receives for collection a check or draft on the only bank doing business in another city, as

in this case, it is the universal custom of banks in this state to send the paper directly to the drawee for collection and remittance. There is some question whether a compliance with this custom will excuse the forwarding bank from the charge of negligence. The doctrine that the drawee is not a proper agent to be chosen by a forwarding bank to collect a check or draft from itself is sustained by numerous authorities which may be found in foot note 82, 5 Cyc. 507. The text of Cyc. at the same page further states:

"But some states which deny the legality of the rule permit the paper to be sent to the drawee when there is no other bank in the place known by the owner and collection by a different method would be costly and inconvenient."

In support of this announcement, several citations are made in foot note 83. The cases cited, and others of the same tenor, are reviewed at length by the supreme court of Tennessee, in *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441, and the conclusion of Niel, J., who writes the opinion, is that they do not support the text.

For the purposes of this case, we will assume, without deciding, that the custom of banks pleaded and proven by the respondent, will not excuse it and the Pacific National Bank from the charge of negligence in sending the check directly to the drawee for collection and remittance, and further assume that the failure of respondent and its agent to promptly notify appellant that the check was not paid on presentation was also negligence. Yet we conclude the appellant has not shown that such negligence resulted in any loss or damage to him. Negligence of respondent or the Pacific National Bank can be of no avail to appellant, unless it caused him loss which he would not otherwise have sustained. In other words, if the bank of A. W. Schafer & Company was insolvent when the check was given, and if prompt notice to appellant of the dishonor of the check would not have enabled him to protect himself by causing the check to be paid, or

withdrawing his deposit from the bank, he has sustained no damages as the result of such negligence. He admits that the check did not necessarily constitute payment of his debt, and relies solely upon negligence of the respondent and its agent, the Pacific National Bank, to relieve himself from liability. Assume that the Pacific National Bank had sent the check to some other agency, such as an express company in the town of Hamilton, for collection from A. W. Schafer & Company. Payment could not have been demanded prior to banking hours on November 6, 1907. Had the check been then returned through the bank and respondent, appellant could not have received it in due course of mail prior to November 8, 1907. On that date the bank did not have sufficient funds to pay the check. Appellant, as shown by the allegations of his complaint filed in the receiver action, actually learned, on or before November 15, 1907, that A. W. Schafer & Company was dishonoring checks of its depositors, and had actually neglected to pay this particular check on presentation and demand. At that time the bank had more available funds that it had on any other day after the check was issued. Appellant then made no attempt to protect himself, either by insisting upon payment of the check or by attempting to withdraw his deposit. Nor does it appear that he could have succeeded in doing so at any time after November 4, 1907. The circumstances indicate the contrary. According to his own evidence, he and other interested parties, then being in Sedro Woolley, in Skagit county, telephoned to Hamilton for Mr. Schafer, who went to Sedro-Woolley, and after a conference there held, they proceeded to Mount Vernon, the county seat, when appellant filed a complaint showing the insolvency of the bank, and demanding a receiver. On the trial of this action appellant, referring to the time when his complaint in the receiver action was presented to the superior court, testified as follows:

"When he [Mr. Schafer] came down, they drew up this complaint and I signed it, and I brought it in before the court,

and the judge said at the time he would be very slow to put any bank in the hands of a receiver unless there was good grounds shown; and I said that 'This is no matter of animosity,' and I said, 'I will withdraw the complaint if Mr. Schafer would say so,' and I told Mr. Schafer I would give him five thousand dollars in cash to tide him over, and he said it wouldn't tide him over, that the bank had to go."

He nevertheless contends that he theretofore knew nothing about the actual condition of the bank. Other circumstances disclosed by the record seem to negative this statement, and were sufficient to have put him upon notice. For some time prior thereto he had been reducing his deposits, and knew the bank could not obtain funds to meet its obligations. Yet under these circumstances, instead of withdrawing all of his deposit, he sent his check to respondent at Tacoma, knowing that in due course of mail several days would necessarily elapse before it could be presented to the drawee bank for payment. There is no evidence in the record upon which a finding that appellant suffered any damage or loss whatever by reason of any alleged negligence of the respondent or its agent, the Pacific National Bank, can be intelligently predicated. In *Sahlien v. Bank of Lonoke*, 90 Tenn. 221, 232, 16 S. W. 373, it is held that the neglect of a collecting bank to notify a drawer of the nonpayment of a draft for ten days after its receipt for collection, is not sufficient to impose a liability for the amount of the draft, where the evidence tends to show that the drawee was insolvent at the time the draft was received; and that the burden is upon the plaintiff in such a case to show that the claim was good and collectible. In this action it devolved upon appellant to show that some actual loss had resulted to him from the alleged negligence of the respondent and the Pacific National Bank, its agent. But he has made no such showing. He therefore failed to maintain his affirmative defense.

The judgment is affirmed.

Morris, J., concurs.

CHADWICK, J. (concurring)—The Pacific National Bank was not negligent in sending the check to the drawee, it being the only bank in Hamilton. I therefore concur on the first ground discussed by Judge Crow.

[No. 9066. Department Two. April 10, 1911.]

SEATTLE TURNING AND SCROLL WORKS, *Plaintiff*, v. GUST ECKLOFF, *Respondent*, W. R. COLBY, JUNIOR, *et al.*, *Appellants*.[1]

APPEAL AND ERROR—REVIEW—ESTOPPEL TO ALLEGE ERROR. Defendant owners, in an action to foreclose a mechanics' lien, cannot allege error in failure to sustain a demurrer to the cross-complaint of the defendant contractor as premature, where the defect was not disclosed on the face of the cross-complaint, the contractor was properly made a party and compelled to answer, and the plaintiffs joined issue thereon seeking affirmative relief against the contractor, and went to trial on the merits.

APPEAL AND ERROR—REVIEW—FINDINGS—CONCLUSIVENESS. Error cannot be urged in failing to allow defendant's entire cross-claim for damages for delay, where the same was put in issue, the evidence was not all brought up on appeal, the statement of facts recites that evidence was introduced tending to support the findings of fact made by the court, and the court found that the cross-claim for damages was not proven except as to the items allowed.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 6, 1910, upon findings in favor of a defendant lien claimant, after a trial on the merits before the court without a jury, in an action to foreclose a materialman's lien. Affirmed.

E. P. Whiting, for appellants.

Israel Nelson and *Robert C. Saunders*, for respondent.

CROW, J.—This action was commenced by Seattle Turning and Scroll Works, a corporation, against Gust Eckloff,

[1]Reported in 114 Pac. 893.

W. R. Colby, Jr., and Alice R. Colby, his wife, to foreclose a materialman's lien. The defendant Gust Eckloff, who, under a written contract with the defendants Colby and wife, the owners, had constructed the building upon which the lien was claimed, filed his answer and cross-complaint. By the answer he admitted all allegations of the complaint except the alleged value of attorney's fees claimed, and by the cross-complaint he pleaded his building contract with the owners, Colby and wife, his codefendants, and sought to foreclose a lien on the same property of the defendants Colby and wife, for the amount remaining due on his contract, and for extras. The demurrer of the defendants Colby and wife to this cross-complaint was overruled, and they answered, admitting the building contract, the payments made by them, the balance due on the contract price, denying the claim for extras, and affirmatively pleading damages which they claimed to have sustained by reason of Eckloff's failure to complete the building within the time in his contract stipulated. The plaintiff, for some reason, possibly upon settlement of its claim by the contractor, seems to have dropped out of the cause without any formal order of dismissal. In any event, the action was tried upon the issues between the defendant Gust Eckloff, as contractor, and the defendants Colby and wife, as owners. The trial court made findings, upon which a decree of foreclosure was entered in favor of the defendant Gust Eckloff. The defendants Colby and wife have appealed.

Appellants first insist that the trial judge erred in overruling their demurrer to the cross-complaint of the respondent Eckloff, and in refusing to dismiss his cross-complaint. They argue that respondent's right of action had not matured when his pleading was filed, and that as far as he was concerned the action was prematurely commenced. No facts sufficient to sustain this contention appear on the face of the cross-complaint, as from its allegations it would appear that the cause of action had matured. There is no evidence before us sufficient to show that respondent's foreclosure was pre-

maturely commenced. Respondent was brought into court by the plaintiff, as a proper party defendant in the foreclosure of its alleged lien, and he was compelled to answer. Issues were thereafter framed between him and appellants, who in their answer sought affirmative relief. Thereafter appellants participated in a trial on the merits, urging their claim for damages. They are now in no position to ask that the cross-complaint of the respondent shall be dismissed as premature.

There is but one controlling question raised on this appeal, and that is whether the appellants are entitled to recover all damages pleaded by them. Only a portion of the amount which they claimed was allowed by the trial judge. The statement of facts discloses a stipulation, to the effect that it contains all evidence introduced on the trial material to the appeal, but the only evidence certified was introduced by the appellants and consisted of certain exhibits and brief testimony of W. R. Colby, Jr., and one other witness. Immediately preceding the evidence of these witnesses, the statement of facts notes the appearances, and then makes the following recital:

"The defendant and cross-complainant Eckloff thereupon introduced evidence tending to support the findings of fact made by the court."

No other or further proceedings are shown. In view of this statement, certified by the trial judge, we fail to understand how we can question the findings made, or the final judgment which they undoubtedly support. Appellants' claims for damages are predicated on a certain stipulation in respondent's building contract, which refers to a written contract between appellants and the Interlaken Land Company, a corporation, for the purchase of certain lots by appellants, and which also refers to a certain mortgage executed and delivered to the Interlaken Land Company by appellant on one of the lots. The building was erected on one of the lots purchased, but not upon the one mortgaged. Appellants claim that, under the terms of the mortgage and the written contract existing

between themselves and the Interlaken Land Company, they were to become liable to the land company for stipulated damages, if the building was not completed by a day certain, that such damages were to become payable on certain conditions therein named, and that respondent's delay had caused appellants to become liable for damages to the land company. In his cross-complaint respondent alleged facts which, if true, would impose all, or at least a portion, of the responsibility for the delay upon appellants, and would tend to excuse him. It thus appears that the delay and its true cause were the subject-matter of issues raised by the pleadings. These issues were heard and determined by the trial judge, who affirmatively found that appellants were only entitled to $165 as damages for delay, which he allowed in fixing the amount of the final judgment. The trial judge further found:

"That the allegations contained in the answer of defendants W. R. Colby, Jr., and Jane Doe Colby, his wife, to the cross-complainant Gust Eckloff are not proven except as to the items hereinbefore set off and allowed to said defendants Colby and wife."

In view of these findings and the certified statement that evidence not before us was introduced tending to sustain them, we cannot enter upon a consideration of the issue as to what additional damages, if any, should be allowed appellant for respondent's alleged delay. Without entering upon a detailed discussion of evidence now before us, upon which appellant relies, we will nevertheless state that, having examined the entire record, we could in no event reach the conclusion that it is sufficient to justify any larger award of damages to appellants than the trial judge has already made.

The judgment is affirmed.

Dunbar, C. J., Chadwick, and Morris, JJ., concur.

[No. 9286. Department One. April 11, 1911.]

C. W. BROWNFIELD, *Respondent*, v. HENRY A. HOLLAND *et al.*, *Appellants*.[1]

EXECUTORS AND ADMINISTRATORS—ACTIONS—JOINDER OF PARTIES—LANDLORD AND TENANT—SURVIVORSHIP—LIABILITY FOR RENT—JOINT OBLIGATIONS. An action for rent may be maintained against the executors of a deceased joint tenant, without showing the insolvency of the survivor, as required at common law, in view of the statute abolishing the doctrine of survivorship between joint tenants, and the reform procedure of the code providing a single form of action, to be prosecuted by and against the real parties in interest, or their executors or administrators in case of actions on contract, and prescribing the form of judgments and the relief to be granted in actions against joint debtors, etc.

LANDLORD AND TENANT—LIABILITY FOR RENT—LEASE—VALIDITY—TERMINATION—BURDEN OF PROOF. Where the pleadings admit that the lessees went into possession under a lease with rent payable monthly, and commenced to pay rent, the burden is upon them to show a termination of the lease prior to the purported term, and they are liable for the rent during the period of their occupancy, as tenants from month to month, regardless of whether the lease was acknowledged or whether it was signed by the wives of the lessors.

EXECUTORS AND ADMINISTRATORS—ACTIONS—CLAIMS—TITLE OF CLAIM. An objection that a claim against an estate was not properly entitled and was insufficient to support an action, is of no avail where the title was not misleading, the verification conformed to the statute, and the claim was rejected.

JUDGMENTS—FORM—JOINT DEBTORS—PARTY NOT SERVED. Error cannot be urged in that a judgment for rent in an action against joint tenants was not entered against one of the joint debtors, nor against the defendants jointly indebted as far as it may be enforced against the joint property of all, as provided by Rem. & Bal. Code, § 236, where such joint debtor was not served and did not appear, the lease recited that he was a nonresident, and there was no evidence that the defendants had any joint property in this state.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered February 21, 1910, upon findings in favor of the plaintiff, after a trial on the merits be-

[1]Reported in 114 Pac. 890.

fore the court without a jury, in an action on contract. Affirmed.

Robertson & Miller, Cohn, Rosenhaupt & Blake, and *W. E. Southard*, for appellants.

Burcham & Blair and *D. W. Bailey*, for respondent.

Gose, J.—On the 7th day of June, 1905, the plaintiff leased certain business property in the city of Pendleton, Oregon, to S. J. Holland and J. F. O'Meara, for the period of five years, beginning on the 10th day of June, 1905, and ending on the 10th day of June, 1910. The tenants, Holland and O'Meara, by the terms of the lease, expressly agreed to take possession of the property on the 10th day of June, 1905, and to "pay as rental therefor the sum of $105 per month in advance on the 1st day of each and every month during the period of five years." The lease was not acknowledged. The pleadings admit that the tenants entered into the possession of the premises under the lease and made payments of rent; admit that on the 24th day of August, 1907, S. J. Holland died testate; that at the time of his death he was a resident of Spokane; that the defendants Holland were appointed and are acting as executors of his estate; and this his estate consists of property real and personal in Spokane county. The purpose of the action is to recover a judgment against the executors for rent accruing after the death of the testator.

The complaint alleges, and the answer denies, the presentation of the claim. The case was tried to the court, and it found that the lease was made as alleged in the complaint, that the tenants entered into the possession of the leased premises under the lease, made payments of rent thereunder, "and at all times since have been, and now are, in possession of the said premises under the terms of the said lease." The court further found that the claim was presented to the executors, and by them rejected. A judgment was entered

against the executors for the amount of the unpaid rent, as alleged in the complaint. The executors have appealed. A demurrer was interposed to the complaint and overruled.

The several contentions of the appellants may be epitomized as follows: (1) That upon the death of one of two joint debtors, the right of action is against the survivor only; (2) that the primary liability is upon the survivor, and that the respondent should have alleged and proven his insolvency as a condition precedent to a right of action against the personal representatives of the deceased; (3) that an executor cannot be joined with the co-obligor of his testator in a suit for rent which accrued after the death of the latter; (4) that there can be no recovery because the lease is not acknowledged and was not signed by the wives of the parties; (5) that the claim was not properly presented to the executors; and (6) that the judgment should have been entered against both the executors and O'Meara.

In its final analysis, the first two contentions rest upon the theory that the common law as to joint contracts obtains in this state. At common law the death of a joint debtor terminated his liability, and whilst no action at law could be brought against his estate, a recovery could be had in equity upon a showing that the survivor was insolvent. In *Potts v. Dounce*, 173 N. Y. 335, 66 N. E. 4, and kindred cases, it was held that the statute gave a right of action at law, but that the insolvency of the survivors must be alleged and proven. The court said:

"To hold otherwise would be to lose sight of an essential distinction between the engagement of a joint debtor and that of a joint and several debtor."

The common law rule was based upon the ground that a judgment could not be rendered against the survivor and the personal representatives of the deceased because one was to be charged *de bonis propriis* and the other *de bonis testatoris*. The strict rules of the common law, as applied to joint debtors

and joint tenancy, are no longer controlling in this jurisdiction. The reasons for the rule have been abrogated by statute, and the rule ceases when the reason has ceased to exist. The doctrine of survivorship between joint tenants has been abolished. Rem. & Bal. Code, § 1344. Actions are prosecuted in this state by and against the real parties in interest, and all persons interested in the cause of action or necessary to the complete determination of the questions involved must be joined as plaintiffs or made defendants, accordingly as their interests appear. Rem. & Bal. Code, §§179, 189. We have but one form of action for the enforcement of, or the protection of, private rights and the redress of private wrongs, and it is known as a civil action. Rem. & Bal. Code, § 153. Actions for the recovery of, or for the possession of, property, and all actions resting upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates. Rem. & Bal. Code, § 1535. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when justice requires it, determine the ultimate rights of the parties on each side, as between themselves. Rem. & Bal. Code, §§ 406, 407. If the action is against joint debtors, a judgment may be entered against the defendants served, unless the court otherwise directs, and it may be made enforceable against the joint property of all the defendants. Rem. & Bal. Code, § 236, subd. 1. The intention of the law makers is the law, and the office of construction is to discover that intention and make it effective. If the reform procedure accomplished its purpose, it is obvious that the statutes to which we have referred render the common law rules invoked on the first two contentions inapplicable to our procedure. Nor are we without precedents to direct us to this conclusion. In *Donnerburg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254, it was held that, where the surety dies and the principal survives, the surety's estate is not dis-

charged. In *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032, it was held that the liability of a joint debtor survives his death and is enforceable against his estate. In *Spokane v. Costello*, 57 Wash. 183, 106 Pac. 764, we held that the administrator may be joined with the co-obligor of his intestate in a suit upon a bond executed by the intestate and his surety. In Bliss on Code Pleading (3d ed.), § 106, the author says that, whether the personal representatives of a deceased joint obligor can be united as defendant with the survivor should depend upon the law of liability. In the foot note to this section it is said, that the code substitutes a direct proceeding for the "awkwardness and indirection of the old." After discussing the provisions of the code where the reform procedure has been adopted, Pomeroy, in his work on Code Remedies (3d ed.), § 304, thus announces his conclusion:

"It is simply a palpable violation of these positive provisions to say that a creditor shall not maintain a legal action against the personal representatives of a deceased joint debtor, but shall be driven to an equitable suit, and that only in a certain contingency; it is a useless sacrifice to the merest form."

See, also, *Bostwick v. McEvoy*, 62 Cal. 496; *Braxton v. State*, 25 Ind. 82; *Fisher v. Hopkins*, 4 Wyo. 379, 34 Pac. 899, 62 Am. St. 38; *Burgoyne v. Ohio Life Ins. & Trust Co.*, 5 Ohio St. 586.

In the case last cited, in speaking of a statute substantially the same as our statute, the court said:

"This statute effected an entire abrogation of the common law principles to which allusion has been made; and left the estate of the deceased joint debtor liable to every *legal* remedy, as fully as though the contract had been joint and several."

The executors are liable for the breach of the covenant of the testator to pay rent whether the rent accrued before or after the testator's death. *Greenleaf v. Allen*, 127 Mass. 248.

The fourth contention is that there can be no recovery be-

cause the lease is not acknowledged, and because it was not signed by the wives of the parties. Where the husband executes a lease of community property for a term of years without his wife joining in the lease, and where an unacknowledged lease purports to continue for a longer period than one year, the lessee becomes a tenant from month to month or from period to period on which rent is payable, terminable by giving the applicable statutory notice. *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322.

The pleadings admit that the lessees went into the possession of the leased premises and commenced to pay rent. It was neither pleaded nor proven that the lease had been terminated. The burden of showing a termination under the issue was upon the appellants. Nor does the record show that the respondent is a married man. We find no evidence to support the finding that the lessees continued in possession. We think, however, that such is the legal presumption from the admissions in the pleadings. A tenant cannot enter and hold under an unacknowledged lease, without assuming the burden of paying the stipulated rent during the period of his occupancy.

The fifth objection is that the claim presented to the executors was not properly entitled. The title to the claim is: "To the estate of S. J. Holland and James O'Meara . . . debtor to C. W. Brownfield." The title is not misleading, the verification conforms to the statute, and the claim was rejected. The assignment is without merit.

The sixth and last contention is that the judgment was entered against the executors only, and not against O'Meara. It is conceded that O'Meara was not served with process, and he did not appear in the action. Our statute, Rem. & Bal. Code, § 236, authorizes a judgment in such cases "against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served." The respond-

ent might have taken this form of a judgment. There is no evidence, however, that the defendants have any joint property in this state. The lease recites that O'Meara is a resident of the state of Oregon. Aside from this recital, there is nothing in the record to indicate whether he was within or without the jurisdiction of the court. If he was within the jurisdiction of the court, the appellants could have served a cross-complaint upon him and had the rights adjusted as between themselves. Rem. & Bal. Code, §§ 406, 407.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9247. Department One. April 11, 1911.]

PROVIDENT TRUST COMPANY, *Respondent*, v. THE CITY OF SPOKANE, *Appellant*.[1]

DEDICATION — STREETS — BOUNDARIES — INTENT — PRESUMPTION. Where a plat plainly marked the boundaries of two parallel streets of specified widths, and showed an intervening space of twenty feet between the streets, marked "R. R.," which was occupied at the time by a street railway, a dedication of the public streets as marked does not include the intervening space, since an intention to dedicate will not be presumed and does not appear; and a clause reserving from streets dedicated, the 20 foot strip marked "R. R." will not defeat the expressed intent not to dedicate such strip.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 16, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

Fred B. Morrill and *R. L. McWilliams*, for appellant.

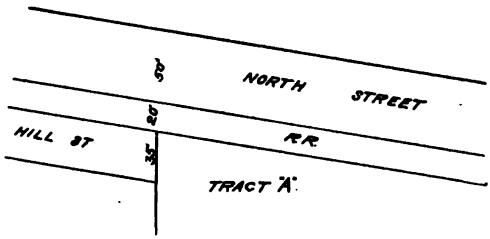
Danson & Williams, for respondent.

[1]Reported in 114 Pac. 1030.

Gose, J.—The plaintiff brought this action for the purpose of enjoining the defendant, a municipal corporation, from taking possession of and improving a designated strip of land as a street. The plaintiff alleges that it is the owner of the strip of land, and the defendant asserts that it is a part of one of the streets of the city. The court found, in substance, that, in the year 1887, Francis H. Cook and wife, being the owners of a tract of land, filed a plat of a part thereof embracing the land in controversy, as Cook's first addition to Spokane Falls, now Spokane; that the deed of dedication contained the clause, "and we do give, grant, donate and dedicate as public highways, the streets as marked and described on the foregoing plat. We reserve, however, the strip of land twenty feet in width marked 'R. R.' for railway purposes, also the exclusive rights in all of said streets to lay down pipes and carry water and gas through same;" that the plat of dedication shows North street to be fifty feet in width, extending along and in front of the strip in controversy; that it shows Hill street to be thirty-five feet in width, paralleling North street, with an intervening strip of land twenty feet in width; that when the plat was filed, a street railway was operated over the intervening strip by the Spokane & Montrose Motor Railway Company; that it continued to operate the road until some time in 1904, when the rails and ties were removed, and that it has not since been used for railroad purposes; that in the year 1894, Cook and wife executed a deed of conveyance for the strip of land in controversy to such railroad company, and at a later date it executed a deed of conveyance to plaintiff embracing such land. As conclusions of law, the court found that the plaintiff is the owner of the land, and that it is entitled to a permanent injunction against the city. The conclusions of law were made effective by the decree. The city has appealed.

It accepts the findings of fact, but denies that the conclusions of law are proper deductions from the facts found. It rests its contention upon the clause in the deed of dedication

which we have just quoted. The appellant first contends that the strip of land in controversy was dedicated as a part of the street. The appended map illustrates the point in dispute:



The land in controversy is the strip of land twenty feet in width marked "R. R.," and lying between tract A and North street and east of the point of termination of Hill street. We cannot adopt the appellant's view. An intention to dedicate will not be presumed, but must clearly appear. *Columbia & Puget Sound R. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670.

"Being a voluntary donation, it will not be presumed without the clearest intention to this end." *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204.

It will be observed that both streets are named and definitely marked upon the plat as having a width of fifty and thirty-five feet respectively. The boundaries of the intervening strip are marked with equal definiteness, and its width is shown on the plat. If the dedicators intended to dedicate it as a street, which of the two streets did they intend should embrace it? It seems clear that the dedication and naming of the two parallel streets with a strip of land twenty feet in width intervening, all marked with certainty, show an express intention not to dedicate the land between the two streets. They did, however, dedicate "as public highways the streets as marked and described." The reservation clause cannot be held to defeat the plain and expressed intention of the dedicators. When the plat of dedication was filed, a street railway was being operated over the disputed strip of ground. It may be that

the clause was inserted for the purpose of protecting some license or easement held by the railway company. However, we need not speculate as to its purpose, as it is obvious that there was no intention to make it a part of either of the streets. *Robinson v. Coffin*, 2 Wash. Ter. 251, 6 Pac. 41.

In *Ayres v. Pennsylvania R. Co.*, 48 N. J. L. 44, 57 Am. Rep. 538, the dedicator laid out a tract in lots and filed a map showing the lots and streets. A street called Railroad avenue, one hundred feet in width, was designated on the map. In its center were parallel lines indicating railroad tracks, and at one place the words "R. R. Depot." In meeting the contention that the strip included within the parallel lines indicating the railroad tracks and depot was not a part of the street, it was said:

"The intent to dedicate two highways separated by a reserved strip is at variance with the map, which delineated but one street, with one name, and of 100 feet width."

Reasoning by antithesis, we have here two parallel highways bearing different names, with their boundaries definitely fixed. If, however, we were in doubt upon this question, that doubt would be removed by the following finding:

"That about the year —— the city of Spokane improved and graded said North street in front of the property described in the complaint but did not enter upon the said property; that in grading said street there was considerable of a cut made in front of the real estate described in the complaint and where such grade was made the city of Spokane put in a retaining wall, being of a height from a point at the east end of said strip to between four and five feet at the west end thereof."

The rule is well settled that, if the meaning of an instrument is doubtful, the practical construction put upon it by the parties will be accepted by the courts. *City of Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. 484. The validity of the attempted reservation of the "exclusive rights in all of said streets to lay down pipes and carry water and

gas through same," may well be doubted, but is not before us. It throws no light on the issue of dedication.

The view we have taken of the case makes the other points pressed by the appellant inapplicable. The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9414. Department One. April 11, 1911.]

THE STATE OF WASHINGTON, *on the Relation of W. H. Bogle et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents.*[1]

STIPULATIONS—CONSTRUCTION—DISMISSAL OF ACTION—ATTORNEY'S FEES. A stipulation for the dismissal of an action, upon conveyance of part of the property in dispute to trustees, who were to pay to the plaintiff's attorneys, on account of their contingent fees, "whatever attorney's fees are allowed or established in their favor for the party of the second part [plaintiff] in such suit," does not contemplate that the fees are to be established in the pending case, but means that the fees are to be paid when determined in an action brought for that purpose; as it is distinctly provided that the pending suit shall be dismissed.

COURTS—JURISDICTION—CONSENT OF PARTIES — RECORD — STIPULATION TO DISMISS ACTION—ATTORNEY'S FEES—PROHIBITION. Where the parties to an action stipulated that it be dismissed upon the conveyance to trustees of part of the property in dispute, the trustees to pay plainiff's attorneys, on their contingent fees, whatever sum might be allowed or determined in their favor, the court has no jurisdiction in the pending case to determine the amount of the fees without service of process or further pleadings, by reason of the fact that the trustees joined in the stipulation and were present or represented at the hearings, where they did not appear and consent thereto, but objected to the jurisdiction of the court; and prohibition lies to prevent proceedings in the action to determine the amount and enforce payment of the attorney's fees.

COURTS—JURISDICTION — DETERMINATION — CONCLUSIVENESS. The decision of a court that it has jurisdiction to determine the contingent fees of plaintiff's attorneys is not conclusive, where it was

[1]Reported in 114 Pac. 905.

based on statements made to the court and a stipulation for dismissal of the action, and the record shows that the court had no jurisdiction over the parties objecting thereto.

Application filed in the supreme court March 2, 1911, for a writ of prohibition to the superior court for King county, Tallman, J., to prevent further proceeding with a cause and to vacate a decree. Granted.

Bogle, Merritt & Bogle, for relators.

James Hart and *Jay C. Allen*, for respondents.

Gose, J.—In September, 1910, one Mary Jeffs, an Indian woman of the full blood, commenced an action against Henry Sicade and Alice Sicade, his wife, in the superior court of King county, for the purpose of canceling and setting aside certain deeds which she had theretofore executed to Henry Sicade. It was alleged in the complaint that the deeds were obtained by means of fraud and without consideration. The defendants' answer joined issue upon the question of fraud, and affirmatively alleged that they had made valuable improvements upon the property. The reply put the affirmative matter in issue. The case was thereafter set for trial. Thereafter, and on February 14, 1911, the plaintiff, the defendants, and the relators entered into an agreement for the settlement of the action. In this agreement Henry Sicade and his wife were named as parties of the first part, Mary Jeffs as party of the second part, and the relators, as trustees of "the Jeffs Orphans Home," the parties of the third part. So far as pertinent to the present inquiry, the agreement provides that Sicade and wife shall convey to the relators as such trustees three-fourths of the value of the property in controversy in that action. It also contains the following clause:

"The suit now pending in behalf of the party of the second part against the parties of the first part in the superior court of King county, state of Washington, shall be dismissed without costs to either party. The attorneys for the plaintiff

having an agreement with the party of the second part for an attorney's fee equal to one-half of the value of the property which they might recover in this action, it is agreed that, whatever attorney's fees are allowed or established in their favor for the party of the second part in such suit, shall be paid by the said parties of the third part as such trustees."

The Sicades thereupon executed deeds to the relators, as trustees, conformably to the agreement, and the deeds were placed in escrow for delivery upon the dismissal of the action. At the time of the execution of the agreement of settlement, Jay C. Allen and James Hart were present as attorneys for the plaintiff, Mary Jeffs, and approved it. After several adjournments and on February 23, 1911, the suit of Jeffs against Sicade was called for trial before the court, the respondent Judge Tallman presiding without a jury. The record shows that, at the hearing had on that date, the only question considered or determined by the court was the amount of attorney's fees to be awarded to the plaintiff's attorneys. This hearing was had without other or different pleadings, and without the service of summons, notice, or other process. The plaintiff's attorneys claimed the right to appear for both the plaintiff and themselves. Mr. Merritt, one of the relator's attorneys in this proceeding, asserted the right to appear for the plaintiff Jeffs and contest the amount of the attorney's fees, and also repeatedly protested against the jurisdiction of the court over the relators. Mr. Bogle, one of the relators, and one of their present counsel, united in the latter protest. Counsel for the defendants Sicade appeared and asked that the case be dismissed, conformably to their construction of the quoted clause of the agreement. The court, however, proceeded to hear evidence as to the value of the property set apart to the trustees, and entered a judgment that Jay C. Allen and James Hart are entitled to one-half such property, and in case the relators as trustees do not, on or before the 6th day of March, 1911, pay to them the sum of $43,125, that they be awarded an undivided one-half in value of all the

property set apart to the trustees, and appointed commissioners to partition it between them and the trustees equally. The decree further provided that, in default of payment, upon the report of the commissioners and its approval, the action be dismissed. The court denied the right of Mr. Merritt to appear for the plaintiff, Jeffs, and litigate the amount of the attorney's fees, on the ground that he had not filed any paper in the cause; denied the motion of counsel for Sicade for a dismissal of the action; and disregarded the protest of both Mr. Merritt and Mr. Bogle that he was proceeding without jurisdiction against the relators. The relators declined to pay the attorney's fee awarded by the court. At this stage of the proceedings, we granted the relators an alternative writ of prohibition, which they now seek to have made peremptory.

It is alleged in the answer to the affidavit for the alternative writ that the court acquired jurisdiction of all the parties "upon statements which had been made to the court, and which were made to the court at the time and upon the written agreement between the parties." It is apparent from the facts stated that the court did not acquire jurisdiction of the relators from any act upon their part upon the day of the hearing. On the contrary, as we have seen, while not appearing, two of their present counsel and one of the relators were present in court asserting a want of jurisdiction over the relators. The relator Bogle came into court at the hearing, in response to the request of the court. Nor do we think jurisdiction of the relators was obtained at any of the several adjournments. If counsel for the relators made an oral appearance before the day of the hearing, they could withdraw it at the hearing. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403. The only issue before the court in the way of formal pleadings was that between the plaintiff Jeffs and the defendants Sicade. That issue was entirely foreign to the question of the compensation of counsel. Jurisdiction is the power to hear and determine.

"Jurisdiction of the subject-matter is the power to hear and

determine cases of the general class to which the proceedings in question belong." 11 Cyc. 669.

Jurisdiction of the person must be acquired by the service of the applicable statutory process, or by the voluntary appearance of the party whose rights are sought to be adjudicated. We do not question the power of a court of general jurisdiction to determine a matter within its jurisdiction without formal pleadings, where the parties in interest appear upon an agreed statement of facts, or appear and submit their evidence and request the court to adjudicate their rights.

It follows that, if the court had jurisdiction of the relators, it was acquired by the clause in the tripartite agreement which we have quoted. A reference to that clause discloses that there was a distinct agreement to dismiss the Jeffs-Sicade suit. The language relied upon by the plaintiff's attorneys and the respondent in support of jurisdiction is that, "it is agreed that, whatever attorney's fees are allowed or established in their favor for the party of the second part [Mary Jeffs] in such suit, shall be paid by the said parties of the third part as such trustees." This language does not mean that the attorney's fees are to be established in the Jeffs suit. Clearly, however, it does mean that the trustees will pay the attorney's fees allowed them for their services to their client Mary Jeffs in her suit against the Sicades, when determined in an action brought for that purpose. Any other view would not only be a strained and unnatural construction of the language employed, but would nullify the provision for the dismissal of the case. It seems that, if the parties had intended that the clause should be treated as a stipulation that the attorney's fees should be determined in the then pending case, they would have provided that the *Jeffs* case should be continued for that purpose. The clause in the agreement did not confer jurisdiction over the relators. *Kalb-Glibert Lumber Co. v. Cram*, 57 Wash. 550, 107 Pac. 381; *Id.*, 60 Wash. 664, 111 Pac. 1050.

The respondents have cited *Meisenheimer v. Meisenheimer*,

55 Wash. 32, 104 Pac. 159, 133 Am. St. 1005; *Groves v. Richmond*, 56 Iowa 69, 8 N. W. 752; *Bedford v. Ruby*, 17 Neb. 97, 22 N. W. 76; *Hutts v. Martin*, 134 Ind. 587, 33 N. E. 676; *Randolph County v. Ralls*, 18 Ill. 29, and *Indiana B. & W. R. Co. v. Bird*, 116 Ind. 217, 18 N. E. 837, 9 Am. St. 842. In the *Meisenheimer* case we held that a visiting superior judge had jurisdiction to hear and determine a motion to vacate a decree in a county other than the one where the decree had been entered, where the parties stipulated that he should so hear it, and appeared at the hearing. In the *Groves* case the question determined was that the transfer of a certiorari proceeding from the district court to the circuit court upon stipulation conferred jurisdiction upon the latter court, in a case where the law gives exclusive jurisdiction to the circuit court in that class of cases. In reaching that conclusion the court said:

"But, where the court has general jurisdiction over the subject-matter, the parties may waive the ordinary process and voluntarily submit the question to the adjudication of the court."

And that:

"The mere fact that the petition and return were filed in the district court before they were filed in the circuit court certainly cannot affect their legal operation."

In the *Bedford* case it was held that the court had jurisdiction to determine a case upon the stipulation of the parties upon an agreed statement of facts. In the *Randolph County* case it was held that, where the court has jurisdiction of the subject-matter, full appearance of the parties without objection confers upon the court jurisdiction of the person, and it may then adjudicate. In *Hutts v. Martin, supra*, it is said:

"It is a general principle of the law, that courts have no power to adjudicate matters not involved in the issues in causes pending before them. Litigants do not place themselves for all purposes under the control of the court, and it is only the interests involved in the particular suit that can be af-

fected by the adjudication. Over other matters, the court has no jurisdiction, and any decree or judgment relating thereto is void. . . . An exception to this rule exists, however, where the parties, by agreement, in open court, permit matters to be adjudicated not involved in the issues in the cause. In such cases the judgment rests upon the agreement of the parties, and not upon the pleadings in the cause."

In the *Bird* case the same principle is thus stated:

"A judgment by agreement will bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment."

These views we think are elementary, and they proceed from the principle that, subject to exceptions not necessary to state here, a party may waive any right or privilege which he has.

The respondents argue that, if there is a question as to whether it was agreed to leave the matter to the court in said action, and the court so found, the finding is conclusive except upon appeal. The vice of this argument is that the answer has set forth the facts relied upon to give the court jurisdiction, and it is expressly alleged in the answer that the judgment of the court is "based upon statements which had been made to the court, and which were made to the court at the time and upon the written agreement between the parties." As we have seen, the record shows that the court proceeded without jurisdiction of the relators.

The court had no jurisdiction of the relators, and they are entitled to a peremptory writ of prohibition prohibiting the respondent from further proceeding with the cause, and directing a vacation of the decree. *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876.

The writ will be made peremptory.

Dunbar, C. J., Fullerton, Mount, and Parker, JJ., concur.

[No. 9451. *En Banc.* April 11, 1911.]

THE STATE OF WASHINGTON, *on the Relation of W. H. Cowles, Plaintiff*, v. J. H. SCHIVELY, *Insurance Commissioner, Defendant.*[1]

STATUTES—CONSTRUCTION—EXECUTIVE CONSTRUCTION. The construction of a statute of doubtful meaning, by the highest law officer of the executive department, while not binding on the courts, is entitled to considerable weight.

NEWSPAPERS—"OF LARGEST CIRCULATION"—DESIGNATION FOR PUBLICATION—DISCRETION OF OFFICER—ABUSE—INSURANCE. Rem. & Bal. Code, § 9037, which provides that the insurance commissioner shall designate two daily papers "of the largest general circulation" for the publication of the annual insurance reports, and that he shall have the right to make a personal examination to determine "which are the two papers of such largest circulation," merely requires him to designate two papers from the class of papers having the largest circulation, and vests a discretion in him to designate any two papers belonging to that class, although the difference in their circulation may be considerable, which discretion will not be controlled by the courts except for abuse (GOSE, FULLERTON, and CHADWICK, JJ., dissenting).

SAME—DESIGNATION OF NEWSPAPER—ABUSE OF DISCRETION. Under Rem. & Bal. Code, § 9037, vesting in the insurance commissioner a discretion to designate a newspaper in Eastern Washington from the class of papers having the largest general circulation for the publication of the annual insurance reports, the commissioner's act in designating a paper having a circulation of from 6,000 to 9,000 when another paper had five times that circulation, is not so arbitrary and capricious as to call for interference by the courts (GOSE and FULLERTON, JJ., dissenting).

MANDAMUS—PLEADING—CONCLUSION OF PLEADER. In mandamus to compel the designation of a certain newspaper for the publication of annual insurance reports, the allegation that the insurance commissioner wrongfully and unlawfully designated a certain paper for the publication amounts to no more than the conclusion of the pleader from the facts alleged.

MANDAMUS—TO PUBLIC OFFICERS—PARTIES ENTITLED TO MAINTAIN. Where the insurance commissioner is vested with a discretion to designate one newspaper from several of the largest circulation, mandamus does not lie at the suit of the paper having the largest circulation to compel its designation.

[1]Reported in 114 Pac. 901.

Application filed in the supreme court March 18, 1911, for a writ of mandamus to the insurance commissioner. Denied.

Post; Avery & Higgins, for plaintiff.

W. P. Bell, Attorney General, and *W. V. Tanner* and *Geo. A. Lee, Assistants* (*E. C. Macdonald*, of counsel), for defendant.

PARKER, J.—This is an original application for a writ of mandamus, in this court, wherein the relator seeks to compel the insurance commissioner to designate the Spokesman-Review as the newspaper in which the insurance companies doing business in this state shall publish their annual statements for the present year, in compliance with Rem. & Bal. Code, § 6119, which provides:

"Every insurance company, corporation or association doing business in the state of Washington shall cause to be published once each year, during the month of March or of April, in two daily papers of the largest general circulation, to be designated by the insurance commissioner, one in western Washington and one in eastern Washington, a full synopsis of its annual statement as prepared by the insurance commissioner: Provided, the secretary of state shall under this act have the right to make a personal examination of the books and records of any such paper, when not satisfied with the affidavits, to determine which are the two papers of such largest circulation. The cost of such examination, when made, shall be paid by the newspapers whose books have been examined; and the refusal of the owner, manager or editor to permit of such examination will be considered prima facie evidence that such paper has not the largest paid circulation."

The case is before us upon demurrer to the petition for the writ, and also upon answer to the petition. Our conclusion upon the demurrer, however, renders it unnecessary to notice the answer. The substance of the allegations of the petition may be stated as follows: The relator is the publisher of the Spokesman-Review, a daily newspaper published at Spokane. This paper has the largest general circulation

of any paper in eastern Washington. Its daily circulation is 30,000 and its Sunday circulation is 49,000. The defendant on about March ——, 1909, designated the Inland Herald, a daily newspaper published at Spokane, as a paper in which the insurance companies doing business in the state should publish their annual statements. This paper does not have a general circulation equal to one-fifth of the largest circulation in eastern Washington. The amount of its circulation is not alleged, but from the allegation made by the relator, it may be assumed that its circulation is nearly one-fifth of that of the largest circulation in eastern Washington. There are from two to five daily newspapers published in eastern Washington having a larger general circulation than the Inland Herald. Prior to March 1, 1909, the relator requested the defendant to designate the Spokesman-Review as the newspaper in which the insurance companies should publish their annual statements for the present year. Thereafter he designated the Inland Herald as such newspaper for eastern Washington. Following the allegations showing these facts, the relator alleges, "Said defendant has, as aforesaid, wrongfully and unlawfully designated said Inland Herald as such paper"; and prays that the defendant be required to designate the Spokesman-Review as the newspaper in which such publication shall be made in eastern Washington, and that his designation of the Inland Herald be annuled.

It is contended by counsel for the relator that the commissioner has no discretion in the designation of the newspaper in which the publications shall be made; that he only has to determine the fact as to which paper has *the largest circulation*, and then designate that paper; and that such determination of fact does not involve discretion. It is contended by counsel for the defendant that the discretion of the commissioner in designating the newspaper, is, under the law, such that the courts cannot interfere therewith, especially in the absence of action on his part amounting to an arbitrary designation of a newspaper without any exercise of honest judg-

ment; that the law does not require the commissioner to designate the newspaper having *the largest* circulation, but only to designate a newspaper from the class having the largest circulation, leaving it discretionary with him as to which one of that class he may designate; and that in any event his decision upon the fact as to which paper has the largest circulation, involves discretion, is final, and not reviewable by the courts.

It is important that we first determine the nature of this duty of the commissioner and to what extent it is discretionary. We may concede, for the sake of argument, that the commissioner is not entirely beyond judicial restraint in the designation of the newspapers for these publications, and still find that his discretion is such that we should not interfere with in in this case. We must first ascertain the bounds of his discretion before we can determine whether or not it has been exceeded. Now, if the commissioner's discretion is limited only to designating one of the class of newspapers having the largest circulation in each division of the state, it is manifestly much broader than if his designation is limited to the single newspaper having the largest circulation in each division of the state. We have noticed that, by the terms of the law, the publications are to be made "In two daily papers *of* the largest general circulation, to be designated by the insurance commissioner." The correct construction of this provision rests largely upon the sense in which the word "of" is used in this paragraph. On March 6, 1905, the secretary of state, who was then under the law ex-officio insurance commissioner, requested an opinion from the attorney general upon this exact question. In compliance with that request, as was his duty under Rem. & Bal. Code, § 9037, the attorney general rendered a written opinion in which he said:

"I believe that the law, clearly indicates that the publication of the reports referred to therein, is to be in a paper which is in a *class* of those having the largest general circulation, and that it is not mandatory that such paper shall be

specifically one having the largest number of subscribers; for if that were the intention of the statute, most of the remainder of the section would be more or less without meaning, especially the clause that states that the paper is 'to be designated by the insurance commissioner, one in western Washington, and one in eastern Washington.' It seems to me that the intention of the statute is that these reports shall not be published in certain smaller papers, of limited county or local district circulation; but in papers that largely and generally circulate in the two sections of western and eastern Washington, respectively."

This opinion, with others of the attorney general, was published in usual manner, in his report to the governor and the legislature for the year 1905, at page 50. Three legislative sessions have been held since then and no change made in this law. This court has recognized the rule that the construction of a law of doubtful meaning, by the department of a state or government charged with its administration, and by its highest law officer, when such law has to do with a matter of public concern, is entitled to considerable weight in determining the intention of the legislature, though, of course, such construction is not binding upon the courts. *Spokane & Eastern Trust Co. v. Young*, 19 Wash. 122, 52 Pac. 1010; *Hicks v. King*, 21 Wash. 567, 58 Pac. 1070.

The word "of" is defined in Webster's new International Dictionary as,

"In the most general sense; proceeding from; belonging to; relating to; connected with; concerning."

Also, as,

"Indicating the aggregate or whole of which the limited word or words denote a part, or of which a part is referred to, thought of, affected, etc.; belonging to a number or quantity mentioned; out of; from amongst; as, most *of* the company; the poor *of* his people; the flower *of* the family; the king *of* kings."

The last quoted definition and examples seem particularly applicable to the word as here used. And it seems to us that

the expression "*of* the largest general circulation" used in this law, does not necessarily mean the two papers having the largest circulation, but could as well be held to mean any two papers belonging to the class having the largest circulation, which class might well consist of more than two papers. Another argument in support of the attorney general's view is that the law fixes no obligation whatever upon any newspaper to publish these statements, nor does the law fix any limit to, or indicate, the charge which the papers may make for such publications. It would create rather a strange situation to say that the law compelled the designation of the newspaper having the largest circulation, and at the same time fixed no obligation whatever upon such newspaper to publish the statements, nor limit the charge therefor. This, we think, indicates that the commissioner's decision is not to be hedged about by hard and fast rules. It may be suggested that such a paper would be eliminated from consideration by the terms of the proviso of the law; but when that proviso is critically read it can hardly be said to limit the source of the commissioner's information to an examination of the books of a newspaper, or to affidavits furnished directly to him by such paper. The law does not tell us what affidavits or whose affidavits he many consider. We are of the opinion that the insurance commissioner under this law has discretion to designate any one of the papers belonging to the class having the largest circulation, and to determine what papers belong to that class, although the difference in the amount of their circulation may be considerable.

Assuming, now, that the commissioner's discretion may be so abused in designating a newspaper as to call for interference by the court, do the facts here alleged show that he has so abused his discretion. The allegations of the petition that the commissioner has "wrongfully and unlawfully designated said Inland Herald," we think means nothing more than that such is the conclusion of the pleader from the facts alleged, and that this conclusion has for its basis only the fact of the

difference in the amount of the circulation of the two papers here involved. According to these allegations, the Inland Herald may have a circulation of from 6,000 to 9,000. We cannot say that the designation of such a paper by the commissioner under this law, in view of the discretion which the law seems to give him, is so clearly arbitrary and capricious as to call for interference by the court, when there is no fact calling for interference save the difference in the circulation of the two papers here involved. In any event, this fact, in connection with the fact that there are evidently other papers than the Spokesman-Review belonging to the class from which the designation may be made, renders it clear that the Spokesman-Review is not entitled, as a matter of law, to such designation at the hands of this court upon the refusal of the commissioner to designate that paper.

This law was not made for the benefit of the newspapers; and while a newspaper publishing these statements would, of course, reap some financial benefit therefrom, such fact should be of no weight, in determining the question of the court's control over the act of the commissioner in making his designation. We are not disposed to treat the question as one of private right, but only as one of public concern. If the relator has the right and legal capacity to prosecute a proceeding of this nature to restrain or control such a public duty of a state officer, which question we do not now decide, it is only because he is a citizen of the state, interested in common with other citizens, and not because he has any private rights involved therein. In its last analysis, this becomes a question of the judiciary interfering with the executive branch of the state government in a matter involving the exercise of discretion of one of the high officers of the state, concerning a public duty only. Before the judiciary will interfere in such a case, it must clearly appear that such officer has so far departed from the line of his duty under the law, that it can be said he has in fact so far abused such discretion that he has neglected or refused to exercise any discretion. When a

private right of a citizen is violated by an executive officer under the guise of official power there is quite a different question presented. We cannot see our way clear to interfere with the commissioner's designation, upon the facts here alleged. The writ is denied.

Dunbar, C. J., Mount, Crow, and Morris, JJ., concur.

Gose, J. (dissenting)—If the purpose of the legislature in enacting the statute was to acquaint the public with the general condition of the insurance companies doing business in the state—and I can conceive of no other purpose, the interpretation put upon it by the majority will defeat the object sought to be accomplished. It is clear to my mind that the scope of the word "of" ought not to be limited as applying to a class of papers, but that it should be held to be synonymous with "having." The single duty of the insurance commissioner under the statute is to designate, that is, identify or point out, to the insurance companies the two daily papers having the largest general circulation, one in western Washington and one in eastern Washington. This view I think is made clear by the provision which gives the secretary of state the right to make a personal examination of the books and records of "any such paper," "to determine which are *the two papers* of such largest circulation." I think the statute imposes only a ministerial duty on the commissioner.

"An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act." 26 Cyc. 161.

The respondent's contention that the statute clothes him with a discretion which cannot be controlled by the courts cannot be sustained. If he is given a discretion and exercises it arbitrarily, his acts are subject to review. If the paper designated has less than one-fifth the general circulation of the Spokesman-Review, as the petition alleges and the demurrer admits, there has been such a gross abuse of discretion

that the law would indeed be impotent if it could not correct the mischief. By no process of reasoning can it be ruled that a discretion which determines that one is larger than five is not subject to the corrective power of the courts. 26 Cyc. 161; *Puget Sound Publishing Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802. The demurrer should be overruled and a reference ordered to ascertain the facts. I therefore dissent.

FULLERTON, J., concurs with GOSE, J.

CHADWICK, J. (dissenting)—It seems that I am unable to agree with my associates. If it were not for that part of the statute providing that the insurance commissioner has the right to make a personal examination of the books and records to ascertain the fact of circulation, I could concur in the majority opinion on the ground that courts cannot control the discretion of a public officer or compel the finding of a particular fact by him. Under a statute similar to ours, but without the proviso or some similar limitation, it has been uniformly held that a court will not control the discretion of an officer or review his finding of fact. *Holliday v. Henderson*, 67 Ind. 103; *Matter of Troy Press Co.*, 94 App. Div. 514, 88 N. Y. Supp. 115; *People ex rel. Opdyke v. Brennan*, 39 Barb. 651; Merrill, Mandamus, § 31.

I contended for this rule in the case of *Times Printing Co. v. Star Publishing Co.*, 51 Wash. 667, 99 Pac. 1040. I find no statute similar to our own to have been construed by any of the courts. But I am of the opinion that, when the statute says that the insurance commissioner shall have the right to make an examination of the books and records of a newspaper to determine its circulation, it is equivalent to saying that it is his duty to do so, unless otherwise satisfied upon such showing as may be called for by him. It does not appear that any showing was called for in this case. The terms "right" and "duty," as here employed are correlative. The word "right" was used to give power to the commissioner in the performance

of a duty where he might otherwise be hampered in carrying out the spirit and mandate of the statute. It if were not the intent of the law to compel the publication of these notices in the paper having in fact the largest circulation, it was unnecessary to point out a specific method for ascertaining that fact. The way was not left discretionary, as in the statutes referred to in the cases which I have cited. Therefore the duty of the commissioner is not to exercise a discretion, but to determine a fact capable of mathematical demonstration, and when the fact is determined, the duty becomes ministerial. There is no discretion.

"When the law requires a public officer to do a specified act in a specified way upon a conceded state of facts, without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus if there be no other remedy." *Matter of Troy Press Co.*, 94 App. Div. 514, 88 N. Y. Supp. 115.

See, also, *United States ex rel. Miller v. Raum*, 135 U. S. 200.

As illustrative of the distinctions I wish to draw, reference may be had to two cases. In *Holliday v. Henderson*, 67 Ind. 103, the statute provided that the statements of foreign insurance companies should be published in "the two leading daily newspapers of the state having the largest general circulation therein." Upon a mandamus proceeding brought on behalf of the Indianapolis News, although the complaint alleged that the News was one of the two leading newspapers and had the largest general circulation in the state, and that the papers designated by the state auditor were not entitled to the publication, it was held, on demurrer to the complaint, that the writ would not issue; many cases being cited to sustain the text that, "because the act requires the exercise of discretion and judgment, which is *entrusted by law* to the auditor," a mandate would not issue to compel him to act in a particular manner. In other words, the law being silent as to the manner in which the fact should be found, the court refused to go behind the certificate and designation of the

officer. In *People ex rel. Frances v. Common Council of Troy*, 78 N. Y. 33, 34 Am. Rep. 500, a like holding was made, the court saying that:

"Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and, though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be."

It was held that the act of the city council in designating newspapers would not be controlled although the true fact might be other than as found by the council, the premise of the court's reasoning being that "no mode of ascertaining which papers have the largest circulation is pointed out by the statute, and consequently that question is left open as one of fact to be determined by the common council;" indicating that, if a mode had been provided for ascertaining the fact, the rule would have been otherwise. There would have been no discretion. It is so here. The mode is pointed out.

"Where the particular steps for the accomplishment of an object are prescribed by law, or from the nature of the case the act can be performed in but one way, the writ may very properly specify the exact thing to be done." Spelling, Injunctions and Other Extraordinary Remedies, § 1434.

As I read the statute, this case does not come within the rule that discretion and judgment will not be controlled, nor within the rule permitting courts to control the act of public officers when they have acted arbitrarily or in fraud of the rights of an individual; but rather within the primary rule that, where an act is ministerial, no discretion or judgment being left to the officer, mandamus is a proper remedy.

The writ should issue.

[No. 9198. Department One. April 13, 1911.]

STANDARD LUMBER COMPANY, *Respondent*, v. EAGLE LUMBER COMPANY, *Appellant*.[1]

APPEAL AND ERROR—BRIEFS—SPECIFICATION OF ERRORS. Error in the exclusion of evidence and refusing to allow amendments to a complaint will not be considered on appeal where the opening brief neither states the offered evidence or amendments or refers to the pages of the record where they can be found.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 25, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Frederick W. Dewart, for appellant.

Danson & Williams, for respondent.

PARKER, J.—On October 5, 1908, the plaintiff and defendant executed and delivered to the Security State Bank of Northport, Washington, their joint promissory note for $1,000, payable thirty days after date. On November 28, 1908, the plaintiff was compelled to pay the note. While the note upon its face was apparently executed by both the plaintiff and defendant as principals, the plaintiff claims that it executed the note only as surety. The plaintiff prosecutes this action to recover the amount so paid by it upon the note. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff. The defendant has appealed.

The argument of counsel for appellant presents no question of law, and is directed almost entirely against the court's findings. We have carefully reviewed the evidence and are convinced that it is ample to support the conclusion that respondent executed the note as surety for appellant, and that

[1]Reported in 114 Pac. 900.

respondent did not receive any of the proceeds of the note. The evidence was not wholly free from conflict, but even a reading of it from the record, without seeing or hearing the witnesses testify as the trial court did, we think shows that its preponderance is in respondent's favor. We see no useful purpose to serve by reviewing the evidence here.

It is complained in behalf of appellant, that the court erred in refusing to admit certain offered evidence, and also erred in refusing to allow an amendment to be made to the complaint at the trial. We do not feel called upon to discuss these alleged errors, because the offered evidence and proposed amendment are neither of them stated, or any pages of the record referred to showing what they were, in the opening brief. There is a slight attempt to cure this omission in the reply brief. We think, however, there is no merit in these contentions.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9213. Department One. April 13, 1911.]

CHARLES A. SKOOG, *Respondent*, v. COLUMBIA CANAL COMPANY, *Appellant*.[1]

VENDOR AND PURCHASER—CONTRACT—RESCISSION BY VENDEE. Where the contract for the sale of land did not fix any specific time for delivery of the conveyance, contemplating that the vendor should have a reasonable time therefor, the vendee cannot peremptorily rescind for failure to furnish the deed and recover the purchase money paid without giving notice of his intention to rescind and a reasonable opportunity for the vendor to perform; and a mere demand for a deed is not sufficient.

SAME—DELAY IN PERFORMANCE BY VENDOR—REASONABLENESS. Where lots were sold by an irrigation company and fully paid for November 23, 1908, with the understanding that the company was to have a reasonable time to deliver the conveyance with abstract showing good title, and the vendee went into possession and made no de-

[1]Reported in 114 Pac. 1034.

mand for a deed until July 23, 1909, a delay until September 28th is not so unreasonable as to permit the vendee at that time to peremptorily rescind the contract, without giving notice of any intention to do so (DUNBAR, C. J., and GOSE, J., dissenting).

SAME—TENDER OF DEED—TIME FOR PERFORMANCE. Where a contract for the purchase of land contemplated that the vendor was to have a reasonable time to deliver the deed, and the vendee gave peremptory notice of rescission on the day before action brought, and took the attitude that no tender thereafter would avail, a tender of a deed by bringing the same into court is timely.

MORTGAGES — RELEASE — EFFECT OF PARTIAL RELEASE — WATER RIGHTS. Where an irrigation company gave a blanket mortgage on certain lands and all of its water rights and privileges, the release of certain lots not covered by the mortgage has the effect of discharging from the lien of the mortgage the water rights that go with the lots, there having been no need of releasing the lots except in so far as lots carried with it the title to the water rights.

MORTGAGES—LANDS CONVEYED—EXCEPTIONS. A mortgage upon the lands and water rights of an irrigation company "excepting therefrom such rights as have heretofore been sold or contracted to be sold" by the company is not a lien upon lots and water rights contracted for several months before the execution of the mortgage.

TRIAL—FINDINGS—SPECIAL VERDICT—QUESTIONS OF LAW. Where objection to title, evidenced by an abstract, involves only the question of the lien of mortgages, as appears from their face, a question of law is presented, and the advisory verdict of a jury is no proper guide to the decision.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered June 27, 1910, in favor of the plaintiff, after a trial before the court and a jury, in an action on contract. Reversed.

Shank & Smith and *Pedigo & Smith*, for appellant.

Rader & Barker and *H. B. Noland*, for respondent.

PARKER, J.—The plaintiff commenced this action to recover from the defendant the purchase price of certain land in Walla Walla county, and the value of the improvements placed thereon by him, which land he went into the possession of under a contract with the defendant for the purchase thereof. He claims the right to rescind the contract because

of the failure of the defendant to convey to him the title to the land as agreed by the terms of the contract. The cause was tried as a suit in equity, though the court submitted special interrogatories to a jury for an advisory special verdict. The trial court adjudged that the contract was rightfully rescinded by the plaintiff, and rendered judgment in his favor and against the defendant for $5,155.11. From this disposition of the cause, the defendant has appealed.

In the year 1905, appellant was organized as a corporation under the laws of this state, its declared objects, among others, being to acquire water and water rights for the purpose of irrigation and water power, and "particularly to appropriate water for irrigation and power from the Walla Walla river. . . .;" also to buy, sell, improve and deal in real property. In the year 1906, its president entered into a contract with the state of Washington for the purchase of a portion of section 16, township 7, N. R. 31 East. This land is near the town of Attalia and not far from the confluence of the Walla Walla and Columbia rivers, and is capable of irrigation from the Walla Walla river. The purchase price under this contract was payable in annual installments at the option of the purchaser, the last installment being due in 1915. While this contract was executed in the name of appellant's president, he held the same in trust for appellant; so, for the purpose of our present inquiry, we will treat the contract as appellant's property. It was thereafter assigned to appellant by its president, and thereafter a deed was issued for the land to appellant by the state of Washington. Appellant contemplated platting this land into small tracts to be called "Attalia five acre tracts," and it was thereafter officially so platted, the plat being executed before the commencement of this action, and filed with the county auditor soon after the commencement of this action. A preliminary plat had been prepared for the purpose of selling the tracts, prior to November, 1908, and the land had been placed in the hands of the Attalia

Development Company by appellant for sale according to the plat.

On November 23, 1908, that company entered into a contract with respondent for the sale of lots 97 and 112 of the plat, which description corresponded with the N. E. ¼ of the S. E. ¼ of the S. E. ¼ of section 16, containing ten acres, excepting roads along the north and east lines thereof. While this contract was executed by the Attalia Development Company and respondent, we think it was in effect the contract of the appellant as well, as we will later see. This contract was upon a printed form adapted to a contract of sale wherein the payment of the purchase price is to be paid in installments, and contained a provision that, upon the completion of the payments, the company will furnish the purchaser an abstract of title to the land showing unencumbered and marketable title, and convey the same to him by warranty deed. The total purchase price under this contract was $3,500, and was paid in full by the conveyance of certain land in Minnesota belonging to respondent, so that he would be entitled to a deed for the land described in the contract immediately, if the language of the contract be taken literally. It is plain, however, from circumstances surrounding the transaction and the fact that the contract was then taken instead of a deed, that the company was to have a reasonable time to furnish the deed. It is also apparent that it was understood that such deed would not be furnished until some time in the spring of 1909, though no certain time was fixed. Respondent and his wife entered into possession of the land, which was then in a wild and uncultivated state, and remained in possession until after the commencement of this action in September, 1909. During this period they cultivated the land, planted fruit trees, and built a dwelling thereon. They also irrigated the land by water furnished in compliance with the contract.

Early in the summer of 1909 respondent made inquiry about getting his deed, when he was informed, in substance, that the company was not yet ready to give a deed. He there-

after asked to have his contract exchanged for one made by the appellant, evidently having learned that appellant was the company from which his title was eventually to come. In compliance with this request, on July 23, 1909, appellant and respondent entered into a contract which was, in substance, the same as his contract with the Attalia Development Company. At this time he demanded a deed, but was again informed, in substance, that the company was not yet ready to give a deed, its officers then making some excuse to the effect that its plat and abstract were not yet ready. While this contract in its printed portion contained substantially the same provision as to the time for giving a deed, it is plain that the parties thereto contemplated further time for the giving of such deed, though no time was fixed therefor. Among the interrogatories asked of, and answered by, the jury were the following:

"Interrogatory (6). Did the plaintiff, after paying the purchase price of said land or after transferring to said company his interest in said Minnesota land, demand of said company an abstract of title of said land and a deed thereof? If not, did he do so at any time, and if so, when? Answer—Demanded deed July 23 and August 7, 1909."

"Interrogatory (19). Did the plaintiff, before the commencement of this action, notify the defendant, that, unless it furnished him a deed and abstract of title of said land, he would rescind his contract to purchase said land, and demand a return from it of the money paid by him to it, and payment of all damages by him sustained on account of its failure so to do? If, so, when did he do that? Answer—August 7, 1909, demanded deed or money."

"Interrogatory (20). Did plaintiff afterward offer to deliver to defendant his contract with it for the purchase of said land and the possession of said land and declare to it that he then rescinded said contract and tender said contract to it? If so, when did he do that? Answer—Yes, on September 27, 1909."

These interrogatories, and the answers made thereto by the jury, covered all the facts found upon the question of a de-

mand for a deed and rescission of the contract. No finding was made indicating that there was any demand for a deed coupled with a notice that if such deed was not given within some specified time, or a reasonable time, that respondent would rescind the contract. Interrogatory and answer No. 19 comes the nearest thereto of any finding made. On September 28th, the day following respondent's declared rescission, as found in interrogatory and answer No. 20, this action was commenced by the service of a summons upon appellant at Attalia. It was upon these findings, and others touching the amount of money judgment respondent would be entitled to if the contract had become effectually rescinded, that the trial court rendered its judgment. The cause proceeded to trial on April 19, 1910. In its answer appellant offers to perform as follows:

"The defendant, since entering into said contract, has used diligence and all the diligence contemplated by the parties hereto towards perfecting its plat and title to said property, and has now perfected its plat and title to the said property, and can now convey to the said plaintiff a good fee simple title to the same free from all incumbrances, except those arising from the acts or omissions of the plaintiff; and the defendant herewith tenders to the plaintiff a warranty deed in due form conveying to the plaintiff such title, together with an abstract of title as provided in the contract between the parties."

Appellant produced a deed for the land to respondent, and also an abstract showing the condition of the title to the land, at the trial, and there tendered them to the respondent, which tender was refused. These were left with the trial court for respondent, and have been sent here with the record for our inspection.

The first and principal question for our determination is, Was the contract effectually rescinded by the respondent prior to the commencement of this action in the superior court? Since the circumstances under which this contract was entered into plainly show that there was no specific time within the

contemplation of the parties when the deed was to be given to the respondent for the land, counsel for both parties, as we understand them, concede that appellant would have a reasonable time to give a deed and furnish the abstract as agreed. This, we think, renders it clear that the right of rescission in respondent, on account of nonperformance on the part of appellant, would not arise at any particular moment to be determined by what might be found to be a reasonable time following the making of the contract, and respondent then be enabled to peremptorily rescind the contract by informing appellant that he does so, without any previous notice or warning that he intends to rescind. The contention of counsel for respondent seems to be that, after a reasonable time for performance has expired after the making of the contract, respondent could peremptorily rescind the contract without giving appellant any previous notice or warning that he intended so to do. In other words, that respondent's rights in this respect would be the same after the expiration of a reasonable time for performance as if the time for performance had been fixed by the terms of the contract at a particular time and that time had expired. However peremptorily a party to a contract may rescind the same upon failure of performance by the other party, when a certain time is fixed for performance by the terms of the contract, the rule seems to be, that when the time for performance is not so fixed with certainty, the party seeking to rescind, upon the ground of nonperformance by the other party, must give notice to such party of his intention to rescind, and a reasonable time thereafter for performance by the other party.

In the case of *Walters v. Miller*, 10 Iowa 427, 429, the rule is stated as follows:

"In contracts for the sale of real estate, when the purchase money has been paid, but no deed executed, the purchaser will not be permitted to rescind the contract and recover back the purchase money, unless the vendor has been guilty of fraud in making the contract, or the vendor cannot or will not per-

form on his part, or unless there has been a voluntary rescission of the contract without default on either side.

"To rescind a contract the law requires some positive act, by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives him a reasonable time to comply."

In the case of *Owen v. Pomona Land & Water Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253, we find a situation not materially different from this case, in so far as the principle involved is concerned. While the contract in that case seemed to fix a specific time for conveyance, the dealings between the parties thereafter showed that that part of the contract was waived, and therefore it became a question of reasonable time for performance. Touching the right of rescission under such circumstances, the court said:

"If therefore, the plaintiff had elected to rescind at that time, his right so to do would probably have been clear. But he did not elect to rescind at that time. Instead of rescinding, he accepted the promise of the defendant to cure the defect in its title, and rested upon it for two years and a half before taking any further action. For this, of course, he was in no wise to blame. He had a right to accept and rely upon the promise of defendant to perfect its title, and in the meantime to hold his right of rescission in reserve, to be exercised when, after a reasonable opportunity so to do, the defendant had failed or refused to redeem its promise; for while it is true that the right to rescind must be exercised promptly and is lost by delay, it is equally true that it does not lie in the mouth of a delinquent party to object to a delay which has been granted at his instance in order to enable him to perform an agreement which he is unable to perform at the time stipulated. On the other hand, it seems to follow that when, in consequence of some promise of the delinquent party, rescission has been delayed beyond the proper time, the right to rescind will not be revived until a reasonable opportunity has been afforded for compliance with such promise, unless it is by its terms to be performed within a certain time."

See, also, 2 Warvelle, Vendors (2d ed.), § 868.

We think it clear from this record that respondent was

bound to comply with this rule before he could render his attempted rescission of the contract effectual. We have carefully read all of the evidence and are convinced that at no time did respondent come nearer to meeting this requirement than as stated in the special findings of the jury above quoted. The 6th interrogatory and answer finds nothing but demands for deed on July 23d and August 7th. There was then no indication of an intention on the part of respondent to rescind the contract for a failure to comply with those demands. The 19th interrogatory and answer finds nothing but a demand for "deed or money." The 20th interrogatory and answer finds that respondent peremptorily declared a rescission of the contract on September 27th, the day before he commenced this action. It is evident that he did not then intend to give any time for complying with the contract by appellant. We think these findings are as favorable to respondent as the evidence will warrant. It is clear that at no time prior to September 27th did respondent indicate any intention to rescind the contract as a result of appellant's failure to give him the deed and abstract. The demands prior to that time did not evidence an intention on the part of respondent to rescind, any more than they would evidence his intention to enforce his rights by specific performance; and we have seen that the peremptory rescission made on September 27th gave no time whatever for performance. We are of the opinion that, at the time the suit was commenced on September 28th, the contract had not been effectually rescinded.

What has been said thus far would seem to entirely dispose of the case, but counsel for both parties have submitted to us the question of whether or not the deed and abstract tendered by appellant to respondent during the trial is a compliance with the terms of the contract on the part of appellant. In view of appellant's tender in his answer, the respondent's attitude in the case indicating that he would not entertain any tender, and the actual production of the deed and abstract at the trial and leaving them with the court for respondent, we

deem it unnecessary to go into the question of whether or not such tender was made within a reasonable time after he attempted rescission on September 27th. We think that in any event the tender was sufficient as to time, in view of the position respondent was taking, which was in effect that no tender after September 27th could avail appellant anything. The only objection to this tender, other than as to the time of making it, is that the title to the land and the water rights in connection therewith agreed to be conveyed by the contract are encumbered. Our attention is directed to a mortgage for $75,000 given by appellant in the year 1905, covering certain lands belonging to it, but not this land, and all of its water rights. The lots here involved were released from the lien of this mortgage. It is contended that since this release only purports to discharge the lien of the mortgage upon the lots here involved, describing them by number, that the lien is not thereby released upon the water rights which go with the lots. We are not able to adopt this view. This was apparently a blanket mortgage covering a great deal of land belonging to appellant and all of its water rights. The concluding words of the description being:

"It being the intention hereby to mortgage all the existing property and property rights and privileges whatever belonging to and all those to be hereafter acquired by the first party, including all water rights and privileges."

There was no need of releasing the mortgage lien from the lots except in so far as the title to those lots carried with it the water right. We think that was the purpose of that release. We realize that we cannot decide this question finally as against the mortgagee. We must nevertheless decide it upon the facts presented, and upon these facts we are of the opinion that the mortgage lien is by this release discharged as to the water rights going with these lots. Our attention is also directed to a mortgage for $150,000 upon lands and water rights of appellant executed in December, 1909, which it is claimed is a lien upon the water rights going with these

lots. But we find in that mortgage, following the description of the water rights mortgaged, the following: "Excepting therefrom such rights as have heretofore been sold or contracted to be sold by the Canal Company." These lots and the water rights going with them were contracted for on July 23, 1909, several months before the execution of this mortgage. The mortgage is apparently not a lien upon these water rights. We have not overlooked the finding of the jury in its answer to interrogatory No. 17, to the effect that the appellant is not now able to convey good title to the land. Aside from the fact that this finding is merely advisory, it is only an attempted decision by the jury of a question of law.

As we have seen, the objection to the title, as evidenced by the abstract, involves only the question of the lien of these mortgages upon the water rights going with the lots. This presents only a question of law to be determined by a construction of the release of the first mortgage, and the terms of the second. The jury's finding is no guide to a proper decision of these questions. The evidence in this case clearly shows that the only possible right of rescission respondent could have would be because of appellant's failure to furnish the deed and abstract before the commencement of the action. Respondent's possession and enjoyment of the premises have, at no time since he first went into possession thereof, been in the least disturbed. There is some evidence tending to show that respondent had a desire to sell the premises, and that for that reason he wanted his paper title perfected. It does not appear, however, that he had any prospective sale in view which was interfered with by the possibility of his inability to give good title. The delay may have been a technical violation of respondent's right, but the evidence does not show that it caused him any actual damage.

We cannot escape the conclusion that the learned trial court was in error in rendering its decision, and the same is therefore reversed.

FULLERTON and MOUNT, JJ., concur.

GOSE, J. (dissenting)—In view of the two demands for a deed and the unreasonable delay of the appellant in executing it, I think the respondent had a clear right in equity to rescind. I therefore dissent.

DUNBAR, C. J., concurs with GOSE, J.

[No. 9184. Department One. April 13, 1911.]

CARRY WILKINSON, *Appellant*, v. HOWARD WILKINSON, *Respondent*.[1]

DIVORCE—APPEAL—DECISIONS REVIEWABLE—APPEAL FROM PART OF DECREE. A wife to whom property is awarded on a divorce cannot appeal from that part of a decree awarding the divorce, without also appealing from the award of the property to her, in view of Rem. & Bal. Code, § 989, which makes a division of the property ancillary to the power to grant the divorce; since the statute, § 996, only authorizes an appeal from a disposition of the property without appeal from the decree of divorce.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 18, 1910, granting to defendant a divorce upon his cross-complaint, after a trial on the merits before the court, in an action for separate maintenance. Dismissed.

Ellis, Fletcher & Evans, for appellant.

Marshall K. Snell and *Bertha M. Snell*, for respondent.

FULLERTON, J.—On January 20, 1909, the appellant, Carry Wilkinson, brought an action in the superior court of Pierce county against the respondent, Howard Wilkinson, for maintenance, alleging abandonment and failure to support on the part of the respondent, and praying that the respondent be required to pay a fixed sum monthly for her support. The respondent answered, setting forth facts tending to show

[1]Reported in 114 Pac. 915.

inability to pay the sum demanded, and want of necessity therefor on the part of the appellant; and by way of affirmative relief filed a cross-complaint praying for an absolute divorce from the appellant. The cross-complaint was put in issue by an answer, and a trial was had on all of the issues made, resulting in a decree awarding the respondent an absolute divorce as prayed for in the cross-complaint. The decree, also directed the respondent to pay to the appellant the sum of thirty dollars per month for her support, and awarded her, as her own separate property, a life insurance policy on the life of the respondent for the sum of $1,000, then fully paid up. The appellant thereupon gave notice of appeal from the decree as follows:

"You and each of you, will please take notice that the above entitled plaintiff Carry Wilkinson appeals to the supreme court of the state of Washington from the judgment and decree made, rendered and entered in the above entitled cause by the above named court on the 18th day of March, 1910, and to each and every part of said judgment and decree except in so far as said judgment and decree awards to said plaintiff the life insurance policy for one thousand dollars ($1,000) described and mentioned in said decree."

The respondent moves to dismiss the appeal, basing his motion on the ground that an appeal will not lie from that part of a decree in a divorce proceeding granting a divorce, where the decree as a whole not only grants a divorce, but partitions the property of the spouses between themselves.

It has seemed to us that the motion is well taken. The code (Rem. & Bal. Code, § 989) provides that in granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, etc. It is plain that, by this section of the statute, power to partition the property between the parties exists only where the divorce is granted. In other words, the power to partition the property is ancillary to the power to grant the divorce, and can

be exercised only after the principal power is exercised. It is plain, also, that if the appeal is entertained in the present case, it may finally result in a decree partitioning the community property of the parties between them, and denying them a divorce. Whether a court has jurisdiction in a suit between husband and wife to partition between them their community property to be held thereafter as separate property, we need not here determine, but we are clear that it was not the purpose of the statute to permit such a partition in a suit for a divorce where the main purpose of the suit fails.

It is true that in *State ex rel. Holcomb v. Yakey*, 48 Wash. 419, 93 Pac. 928, we held that an appeal would lie from that part of a decree of divorce making a partition of the property, basing it upon the general statute relating to appeals. But while the ground on which the decision was rested may not have been well taken, the decision itself was sound, as the statute relating to the granting of divorces expressly provides for an appeal from that part of a decree of divorce which disposes of the property or awards the children, without appealing from the entire decree. Rem. & Bal. Code, § 996. But this case is the reverse of that. Here the appeal is from that part of the decree granting a divorce, without appealing from the part of the decree which disposes of the property of the parties. This, as we say, the statute does not permit.

The appeal must be dismissed, and it is so ordered.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 8972. Department One. April 14, 1911.]

THE CITY OF SEATTLE, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

INDEMNITY—PLEADING—DEFENSE OF FORMER JUDGMENT—NOTICE—FAILURE TO TAKE ADVANTAGE OF. Where a judgment for personal injuries had been recovered against a city, on account of a defect in a street at a railroad crossing, to be kept in repair by the railroad company, and the city in a subsequent suit sought to recover over therefor from the railroad company, the company's answer, which pleaded a judgment in a former action exonerating it from negligence, with due notice thereof to the city, and request to plead the same as a defense, and that the city wilfully and negligently failed to avail itself of the defense, does not in effect charge a fraudulent or collusive failure to interpose the former judgment as an estoppel, but properly pleads that the city, with notice of the judgment as a valid defense, failed to plead it.

SAME—NOTICE OF DEFENSE—CONCLUSIVENESS OF FORMER JUDGMENT—PERSONS CONCLUDED—PARTICIPATING IN TRIAL. In such a case, the fact that the railroad company's attorney was present in court at the trial and had opportunity to examine the pleadings, and furnished the city with the names of witnesses, does not affect the force of the former judgment exonerating the company from liability.

JUDGMENT—CONCLUSIVENESS—ISSUES—EXTRINSIC EVIDENCE—SCOPE—IDENTITY OF ISSUES. Where there was a verdict and judgment for a railroad company exonerating it from negligence for a defect in a street which it had agreed to keep in repair, saving the city harmless, and in a subsequent suit against the city for the same injury, the company gave the city due notice of the former judgment, but the city failed to avail itself of the defense, suffering judgment for damages, in an action by the city to recover over from the company, the first judgment exonerating the company from negligence is conclusive and binding on the city; and the instructions to the jury in that case are not competent to prove that the scope of the judgment was not a dismissal on the merits; since extrinsic evidence is inadmissible to prove a state of facts at variance with the judgment.

APPEAL—DECISION—FORMER DECISION AS LAW OF CASE. Where the supreme court has held, on a former appeal of a case, that the failure of a city to plead a prior judgment precluded any recovery against the defendant, the decision will be followed as the law of the case on a second appeal.

[1]Reported in 114 Pac. 1038.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 28, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contract of indemnity. Reversed.

Carroll B. Graves and *Charles H. Winders*, for appellant.

Scott Calhoun and *James E. Bradford*, for respondent.

Gose, J.—There was a former appeal in this case. See *Seattle v. Northern Pac. R. Co.*, 47 Wash. 552, 92 Pac. 411. The case has since been retried, and the defendant, Northern Pacific Railway Company, has appealed from a judgment entered against it. The facts pertinent to the present inquiry are as follows: On the 11th day of September, 1900, Edwin Eskildsen, a boy about four years of age, got his foot caught in an opening in the planking on Railroad avenue on the track of the appellant, and while so held was injured by one of the appellant's moving cars. On September 19, he commenced a suit, through his guardian *ad litem*, in the circuit court of the United States for the western district of Washington, against the appellant, charging that the injury was sustained in consequence of the negligence of the appellant in permitting the opening to exist and in backing the car against him. Issue was joined on the question of negligence, and the defendant affirmatively alleged that the injury resulted from the negligence of the boy and his father, who was with him when the accident happened. The reply denied the charge of contributory negligence. Upon the issue thus joined, the case was tried to a jury, and terminated in a general verdict and judgment in favor of the appellant. The verdict was filed on the 11th day of February, and the judgment was entered on the 23d day of May following.

After the return and filing of the verdict, but before the entry of the judgment, the boy, by the same guardian, commenced an action against the respondent in the superior court of King county to recover for the same injury, and charging

the same acts of negligence. In the suit in the Federal court it was alleged that the injury was received on Railroad avenue, but the complaint did not expressly state that the avenue was one of the public streets of the city. In the suit in the state court it was alleged that the accident happened on Railroad avenue, and that the avenue was then a public thoroughfare in the city of Seattle. The answer put these matters in issue, and affirmatively alleged that the boy and his father were both guilty of negligence. This was put in issue by the reply. Before the case was at issue, the city notified the appellant of the pendency of the action. Thereafter and on June 19, the appellant, in answer to the notice, notified the respondent that it denied liability to either the boy or the city, for the reasons, (1) that it had not been guilty of any act of negligence; (2) that the injury did not occur on any public highway of the city, but that it occurred upon its private property; (3) that it had been exonerated from liability by a judgment entered in the circuit court in a case involving the same subject-matter. It further notified the respondent of the date of the judgment, the court in which it was entered, the names of the parties to the action, and the issue upon which the judgment was entered, and signified a willingness to furnish it the names of the witnesses. The then corporation counsel for the city acknowledged service of this notice on June 20. The respondent's answer in that case is dated June 26, and was filed on July 2. The action was tried on July 5. The city did not plead the judgment of the Federal court as an estoppel. The trial resulted in a verdict and judgment against the city, which was affirmed upon appeal. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64. Thereafter the city commenced this action, for the purpose of recovering the amount of the judgment and costs. It bases its right to recover upon certain obligations arising from franchises which it has granted to appellant and its predecessors in interest.

The appellant denied that the accident happened in a

public street, denied the charges of negligence, and affirmatively pleaded as an estoppel the judgment entered in the Federal court, its notice thereof to the respondent, its offer to produce evidence to establish the estoppel if the respondent would plead the judgment, and that "the city of Seattle further failed and refused to plead, or show by the evidence tendered as aforesaid, that Edwin Eskildsen had brought his action against this defendant in the United States circuit court and that said United States circuit court had entered judgment that no cause of action existed; and by reason of said city failing and refusing to plead such facts and said judgment, and to avail itself of the evidence tendered by defendant, it wilfully and negligently allowed judgment to be taken against it."

On the former appeal three distinct principles were announced: (1) That the action is not barred by the statute; (2) that the former judgment against the respondent did not bar the appellant from proving that the accident did not happen upon a public street; (3) that the failure of the city to plead the judgment of the circuit court as an estoppel precludes a recovery against the appellant. Upon the last question, 47 Wash., at pages 556-7, it was said:

"The Northern Pacific Railway Company pleaded affirmatively the judgment which it obtained against Eskildsen in the Federal court, and urges that the sustaining of the demurrer to this defense by the superior court was error, for the reason that the grounds which are now urged against it as a basis of liability to the city are the identical grounds which were alleged against it by Eskildsen in the case in the Federal court, and upon which the trial was there had, resulting in its favor. We think this position is well taken. The city is here seeking to recover against this railway company because of the negligent manner in which it maintained the planking along its track where Eskildsen was injured, and which it alleges was the cause of his injury. To recover herein and as the foundation for its recovery, it was incumbent upon the city to show that Eskildsen was injured as a result of such negligence on the part of the railway com-

pany. This identical question having been by a court of competent jurisdiction determined in favor of the company in a case wherein Eskildsen was a party, it is evident that had the city interposed that judgment in the action against it by Eskildsen, it would have been a complete defense in so far as any negligence of this railway company was concerned. Had it been interposed, Eskildsen could not have recovered any judgment against the city by reason of any negligence of such railway company. The company having notified the city, after the commencement of such action and before it came to trial, of the litigation and judgment in the Federal court, and offered to produce evidence to establish said facts, and requested the city to plead such judgment, we think that by refusing to so do, the city cannot now be permitted to recover against said appellant."

Upon the filing of the remittitur below, the respondent replied, denying the affirmative matter set forth. The respondent put in evidence the judgment roll in the case of *Eskildsen v. Seattle, supra,* and the appellant put in evidence the judgment roll in the circuit court. To meet this and the new matter which we have quoted from the answer, respondent, over the objection of the appellant, was permitted to prove that there was no collusion attending the procuring of the judgment. Against a like objection, it put in evidence the instructions to the jury in the circuit court.

The respondent first contends that, in view of this evidence, the appellant failed to prove its affirmative defense. By way of argument it is said that the plea in effect charges a fraudulent or collusive failure to interpose the judgment of the circuit court as an estoppel or bar to the suit against the city. We do not so read it, nor was it so construed on the former appeal. A reasonable interpretation of the language of the plea is that the city, with notice of the judgment, failed to plead it. The respondent also offered evidence tending to show that the attorney for the appellant was present in court when the jury was being impaneled; that he had an opportunity to examine the pleadings; and that he furnished the respondent the names of certain witnesses. This does

not militate against the force of the judgment of the circuit court under the law of the case as heretofore announced.

It is also argued that the instructions in the circuit court are competent evidence for the purpose of showing "the scope of the thing adjudged." This is shown by the judgment roll. The ultimate fact to be determined in that case was whether there was any liability against the appellant. The judgment determined that there was no liability. The judgment was conclusive between the parties, until reversed or set aside in some appropriate proceeding. The rule that extrinsic or parol evidence may be admitted to show the scope of the judgment has no application here.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground." 2 Black, Judgments (2d ed.), § 628.

"If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties;" *Packet Co. v. Sickles*, 5 Wall. 580.

It is, of course, elementary that extrinsic evidence is not admissible to prove a state of facts at variance with a judgment upon the merits. Otherwise, there would be no stability to a judgment. As was said by Justice Brewer, in *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626:

"The whole philosophy of the doctrine of *res adjudicata* is summed up in the simple statement that a matter once decided is finally decided."

As we said in *Nunn v. Mather*, 60 Wash. 484, 111 Pac. 566: "It is the final judgment entered in a cause which speaks the court's determination." The verdict and judgment could rest only upon the failure of Eskildsen to prove that the appellant was guilty of actionable negligence, or upon it being adjudged that there was contributory neg-

ligence which precluded a recovery. In either case the judgment would be a final determination that there was no cause of action against the appellant. The true rule is stated by Elliott in his work on Evidence, Vol. 2, § 1529, as follows:

"It sometimes happens that it is impossible to determine from the record alone just what issues were involved or litigated or decided in the former action, and whether the issues in the two actions are the same. Parol evidence is not admissible to contradict the record in the former suit, but it may be admissible where there is uncertainty in the record as to whether the precise question was raised and determined, and the general rule has been stated as follows: 'Whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury, and were necessarily passed on by them.' "

Fayerweather v. Ritch, 195 U. S. 276, is an instructive case on this question.

It is urged with great earnestness that the law of the case was not correctly announced upon the former hearing, and many authorities are cited which hold that the party who is primarily liable cannot stay out of a case and dictate what defenses shall be interposed. We are disposed, however, to treat the conclusion reached on the former hearing as the law of the case. We are aware that this rule is not an inflexible one and binding upon this court. It is, however, fair to the litigants and the trial court, conducive to orderly procedure, and withal sound judicial policy. We have so ruled in many cases. *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 Pac. 1109, 130 Am. St. 1082; *Wheeler v. Aberdeen*, 47 Wash. 405, 95 Pac. 135; *Akin v. Bradley Eng. & Mach. Co.*, 51 Wash. 658, 99 Pac. 1038; *Wittler-Corbin Mach. Co. v. Martin*, 53 Wash. 65, 101 Pac. 494; *Menasha Wooden Ware Co. v. Nelson*, 53 Wash. 160, 101 Pac. 720; *Helmer v. Title Guaranty & Surety Co.*, 55 Wash. 558, 104 Pac. 783; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367; *Starr v. Long Jim*,

59 Wash. 190, 109 Pac. 810. In applying the law of the case, we do not want to be understood as modifying the rule announced in *Seattle v. Regan & Co.*, 52 Wash. 262, 100 Pac. 731, 132 Am. St. 963.

The judgment is reversed, with directions to enter a judgment for the appellant.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9197. Department One. April 14, 1911.]

E. R. WILSON *et al.*, *Respondents*, v. G. H. CLARK, *Appellant*.[1]

DAMAGES—BREACH OF CONTRACT—SALE OF MORTGAGE. On a trade of property, in which the defendant agreed to assign a mortgage constituting a first lien on real estate, of the face and actual value of $658, which was received in lieu of so much money, the measure of damages for failure to assign the mortgage is the amount thereof, and not the difference between the actual value and the face value of a purported mortgage note for that sum, delivered at the time of the trade, but not mentioned in the contract or considered by the parties.

FRAUD—FALSE REPRESENTATIONS—RECORDS OF DISTANT STATE. In a trade of property, a party may rely on and recover damages for false representations that a mortgage included in the trade was a first lien on certain real estate in a distant state, without consulting the public records in such state.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 4, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for damages for fraud. Affirmed.

O. B. Setters and *A. H. Kenyon*, for appellant.

A. E. Russell, for respondents.

PARKER, J.—The plaintiffs commenced this action to recover the face value of a mortgage pretended to have been

[1]Reported in 114 Pac. 916.

owned by the defendant, which he agreed to assign to them in part payment of certain land purchased by him from them. Findings were made and judgment rendered in favor of the plaintiffs upon a trial before the court without a jury, from which the defendant has appealed.

The respondent E. R. Wilson entered into a contract with appellant, G. H. Clark, doing business as G. H. Clark & Co., as follows:

"This agreement, made this 26th day of February, 1908, between G. H. Clark & Co., parties of the first part, and E. R. Wilson, party of the second part. The party of the first part agrees to sign over to the party of the second part a certain mortgage of $658 and balance interest due, 3 horses, and 50 dollars in cash. The party of the second part agrees to deed over to G. H. Clark & Co., a certain tract of land containing 18½ acres legally described as . . ."

In compliance with this contract, respondents executed a deed for their land, appellant delivered the horses, and paid the $50 in cash. For some reason he did not then make a formal assignment of the mortgage, but gave respondents a signed memoranda agreeing to assign the mortgage, in which memoranda there was described certain land in Tellar county, Colorado, claimed to be covered by the mortgage. At the same time he delivered to respondents a promissory note executed by one Lenone and wife to William Mason and W. H. Teel, upon which note there was apparently a balance of $658 unpaid. Appellant did not indorse this note. This note was probably intended to represent the debt which the mortgage was supposed to secure, though we can only infer such fact from the record. At that time appellant also delivered to respondents a certain purported assignment of a mortgage, which assignment was apparently executed by the payees of this note to appellant, and referred to a purported mortgage covering the same land in Colorado described in the memoranda.

The trial court found, "That at the time the negotiations were entered into, the said E. R. Wilson stated to said Clark

and his representatives that he knew nothing about the mortgage or its value, and relied upon their representations as to its value, and said Clark and his representatives thereupon represented to the plaintiffs that the said mortgage was a valid first lien mortgage and worth one hundred cents on the dollar, and the said plaintiffs, relying upon said representations by the said Clark, were induced to and did enter into the above negotiations and completed their part of the transaction." There never was any formal assignment of the mortgage delivered by appellant to respondents, though the same was demanded. No such mortgage can be found of record in Tellar county, Colorado, nor was any such mortgage offered in evidence in this case. Whether or not there ever was such a mortgage, we are not informed. No evidence was offered as to the value of the note, though it does appear that, after the transaction was closed, respondents looked up the makers of the note, who declined to pay interest thereon, and at least one of the makers denied liability thereon. The principal is not yet due. It is plain that respondents had no knowledge of the purported mortgage which was to be assigned to them, except what was told to respondent E. R. Wilson by appellant at the time of and prior to the making of the contract.

It is contended that the trial court's finding above quoted, as to representations made by appellant to respondents, is not supported by the evidence. A careful review of all the evidence convinces us that it is ample for that purpose. Its preponderance seems to us to be clearly in respondents' favor. We deem it unnecessary to discuss it in detail here.

It is contended that the measure of respondents' damages, if any they have suffered, is the difference between the actual value of the note and its face value. In view of the fact that the contract was to assign a mortgage of the face value of $658, with no mention in the contract of any note or personal obligation in connection therewith, and the evidence which clearly indicates that any personal obligation for the

amount supposed to be secured by the mortgage was not considered by the parties as constituting any part of the consideration respondents were receiving, it seems to us that, when respondents failed to get such a mortgage, they were damaged in that sum. It is apparent, not only from the face of the contract, but from the circumstances surrounding its making as shown by the evidence, that the respondents were not relying upon any personal obligation that might go with the mortgage, but relying entirely upon the procuring of a first lien upon real property. This they never received, and were therefore damaged in that sum. Some contention is made that they did not contract to receive this mortgage as for any particular sum, but we think it clear from the record that they were to receive it in lieu of $658 in money.

Some contention is made that since the representations made by appellant as to the mortgage were representations of facts, the truth or falsity of which would necessarily be shown by public records, that respondents were not entitled to wholly rely upon such representations. We think it clear, under the circumstances, that they were entitled to so rely. *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880; *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883; *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102.

We find no error in the record, and therefore affirm the judgment.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9321. Department One. April 14, 1911.]

THOMAS B. YARBROUGH, *Appellant*, v. F. K. PUGH *et al.*, *Respondents*.[1]

ATTACHMENT—PROCESS—NOTICE BY PUBLICATION—PARTNERSHIP—ACTIONS AGAINST—JURISDICTION. In an action of attachment brought against a foreign corporation, constructive service by publication and mailing of the summons to the corporation, is not sufficient to confer any jurisdiction over the attached property belonging to a foreign copartnership of the same name and place, there being nothing in the record to show the names of any of the copartners; in view of Rem. & Bal. Code, §§ 8366, 8369, contemplating that actions against partnerships shall be prosecuted by and against the general partners only, and § 228, requiring that service by mailing be "directed to the defendant," which must be strictly followed.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered July 11, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to recover property held under a writ of attachment. Reversed.

Danson & Williams, for appellant.

Cannon, Ferris, Swan & Lally, for respondents.

PARKER, J.—This is a proceeding to recover personal property, under chapter IV, title IV, Rem. & Bal. Code, § 573 *et seq.*, relating to adverse claims to property levied upon. While the property was in the possession of the sheriff under a writ of attachment, in an action commenced in the superior court for Spokane county by the Manufacturers' Furniture & Bedding Company, a corporation, against The Hefley-Coleman Company, a corporation, the plaintiff in this proceeding, claiming to be the owner, demanded possession thereof from the sheriff, at the same time delivering to him proper affidavit and bond, under Rem. & Bal. Code, § 573. The sheriff thereupon delivered possession of the property to

[1]Reported in 114 Pac. 918.

the plaintiff. A trial before the court without a jury, upon the question of the plaintiff's right to the property, resulted in findings and judgment against him, from which he has appealed.

The facts upon which the rights of the parties depend are not in dispute, and may be briefly stated as follows: On and prior to November 11, 1909, there was in storage with the Seehorn Transfer Company of Spokane, fifty bales of cotton linters, the property of the Hefley-Coleman Co., a copartnership consisting of W. J. Hefley and W. L. Coleman, of Fort Worth, Texas. On November 11, 1909, there was commenced, in the superior court for Spokane county, an action by the Manufacturers' Furniture & Bedding Company, a corporation, against the Hefley-Coleman Company, a corporation, to recover damages in the sum of $2,632.50. On the same day, the plaintiff in that action caused a writ of attachment to issue therein, its president making the usual affidavit and stating as grounds for the attachment, that "said defendant is a foreign corporation." Thereupon a writ of attachment was issued and placed in the hands of the sheriff, when he levied upon and seized the fifty bales of cotton linters as the property of the Hefley-Coleman Company, a corporation, defendant in that action. Thereafter, for the purpose of obtaining constructive service upon the defendant in that action, one of the attorneys for the plaintiff therein, on December 27, 1909, made and filed in the cause his affidavit, stating, upon information and belief, that the defendant is a corporation under the laws of Texas, "with its principal office and place of business located in the city of Fort Worth, state of Texas"; and that he deposited in the United States postoffice at Spokane on that day a true copy of the summons and complaint, securely sealed in an envelope with postage thereon prepaid, "addressed to the above named defendant at the address above given." Thereafter, commencing on January 1, 1910, the summons was published in a newspaper in Spokane county.

The evidence in this proceeding renders it plain that no

other service of the summons, of any nature, was ever made in that case than as shown by the affidavit of mailing as above quoted, and the affidavit of publication in the newspaper. Neither the summons or complaint referred to any attachment. On February 26, 1910, the defendant, "The Hefley-Coleman Company, a corporation," appeared by its attorneys specially in that action, and moved to quash the summons and the service thereof on several different grounds, none of which grounds, however, related to any question of misnaming the defendant. There was nothing in that appearance by which it could be construed to be an appearance, special or general, of the partnership consisting of W. J. Hefley and W. L. Coleman, or of any member thereof. That motion to quash was denied; and on March 28, 1910, judgment by default was rendered in that action against "The Hefley-Coleman Company, a corporation." On February 21, 1910, "The Hefley-Coleman Co.," the partnership consisting of W. J. Hefley and W. L. Coleman, sold the fifty bales of cotton linters here involved, to appellant, who thereafter, on March 12, 1910, commenced this proceeding to recover the same.

The question for our determination is, Was the action of Manufacturers' Furniture & Bedding Company, a corporation, against the Hefley-Coleman Company, a corporation, and the judgment rendered therein, in fact and in law, against W. J. Hefley and W. L. Coleman as partners under the name of "The Hefley-Coleman Co.," and did the superior court in that action acquire jurisdiction over the members of that partnership? In our discussion of this question we will not concern ourselves with the jurisdiction which the court may have acquired over "The Hefley-Coleman Company, a corporation." We are not advised by this record as to whether or not there is such a corporation, other than as it so appears in the record of that case, which was introduced in evidence in this case. Learned counsel for respondents insist that this question is only one of misnomer, which does not affect the

court's jurisdiction over the party actually served with process, and that the partnership was in this case actually so served and was in fact the real defendant. In support of this contention, our attention is called to a number of decisions of the courts holding that the defendant actually served with process is bound to respond as defendant, or suffer judgment to go against him, even though he be erroneously named in the process. Counsel cite the following: *Orman v. Salvo*, 117 Fed. 233; *Davis v. Jennings*, 78 Neb. 462, 111 N. W. 128; *Nisbet v. Clio Mining Co.*, 2 Cal. App. 436, 83 Pac. 1077; *Lafayette Ins. Co. v. French*, 59 U. S. 404; *Foshier v. Narver*, 24 Ore. 441, 34 Pac. 21, 41 Am. St. 874; *Whittlesey v. Frantz*, 74 N. Y. 456; *Hoffield v. Board of Education of Newton*, 33 Kan. 644, 7 Pac. 216; *Kingen v. Stroh*, 136 Ind. 610, 36 N. E. 519; *Pond v. Ennis*, 69 Ill. 341; *Bloomfield R. Co. v. Burress*, 82 Ind. 83; *Ueland v. Johnson*, 77 Minn. 543, 80 N. W. 700, 77 Am. St. 698.

In none of these cases does it appear that the jurisdiction of the court depended upon other than personal service of summons, save in *Nisbet v. Clio Mining Co.*, *supra*, and in that case the jurisdiction was materially aided by a liberal statute relating to the misnomer of corporations, nor was there any partnership there involved.

It might well be argued that the failure to correctly name a defendant in a case where the jurisdiction of the court depends upon constructive service is a matter of much more seriousness than where a defendant is personally served with process. A personal service is made by an officer or some person making actual delivery of the process to the person to be served, and such officer or person so serving is supposed to know who the person is who is intended to be sued. A constructive service depends almost entirely upon the correctness of the name in the process, of the person to be served, or its coming to the notice of such person. This is especially so where the constructive service consists only of publication and mailing; though it might not be so where there is per-

sonal service out of the state. In this case we have no service save by publication and mailing. However, we are here confronted with another question which we regard as decisive of this case.

Now the service depended upon here is the service which, under the law, may be made upon a corporation. Let us suppose, for the sake of argument, that it was sufficient to give jurisdiction over a corporation. Let us even go farther and suppose that it would give jurisdiction over a corporation even though there was a misnomer as to the defendant in the process. This is not a question of acquiring jurisdiction over a corporation, but of acquiring jurisdiction over the members of a partnership. So the real question is as to whether or not this service has resulted in the court acquiring jurisdiction over W. J. Hefley and W. L. Coleman, or either of them, as members of the partnership known as "The Hefley-Coleman Co." If a corporation and a partnership could, under the law, be sued in the same manner as to naming each, and each could be served with process in the same manner as to the persons to be served, jurisdiction might have been acquired over the partnership in this case, assuming that the matter of misnomer, as affected by the fact of constructive service only, created no obstacle to the jurisdiction. If the case of Manufacturers' Furniture & Bedding Company, a corporation, against The Hefley-Coleman Company, a corporation, can be said to be in any sense a suit against this partnership or its members, it is in no event any more than a suit and process against it in its partnership name. It is not pretended that the names of these partners appear anywhere in a single file or record of that suit. It is not pretended that any member of the partnership was served with process therein, personally or constructively. The nearest approach thereto was the mailing of the summons and complaint, as stated in the affidavit of one of the attorneys in that case, which statement, taken literally, means that such mailing was to "The Hefley-Coleman Company, a corporation;" though for the sake of

argument, we will assume that the words, "a corporation" were not used in the mailing.

In the absence of statute providing otherwise, a partnership cannot sue or be sued apart from its members. The rule is stated in the text of 15 Ency. Plead. & Prac., 839, as follows:

"At common law a partnership or firm is not regarded as a legal entity apart from its members, and as it is a general rule that actions can only be brought by and against persons natural or artificial, and partnerships are not considered persons, it is almost universally held that in the absence of express statutory authority all actions and suits involving partnership claims or liabilities must be brought by or against the persons individually who compose the firm."

See, also, 30 Cyc. 565.

This was recognized as the law in this state in *Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. 855. We have no statute in this state changing this rule. We have, however, statutes which evidently were enacted in recognition of this rule. Rem. & Bal. Code, § 8366, provides that actions against limited partnerships "shall be prosecuted by and against the general partners only." And Rem. & Bal. Code, § 8369, provides for the filing of certificates with the county auditor by persons conducting business under other than their true names, and stating therein their true names. These statutes clearly recognized the necessity of partnerships suing and being sued in the name of the individual partners, and that the partnership does not exist in law apart from the individuals composing it. We are not called upon here to determine any doubtful question as to whether or not these partners were sued as individuals, such as might arise where only the name of the partnership appears as defendant in a title to an action and the individual names appeared elsewhere in the record, showing they were being proceeded against as individuals, as in *Olson v. Veazie*, *supra*. Nor where there is a personal service upon one or more of the partners. We are left with the single question, Has jurisdic-

tion been acquired over them, waiving the question of misnomer, by constructive service in the partnership name only? In the case of *Johnson Machinery Co. v. Watson*, 57 Mo. App. 629, the court had under consideration this exact question. The Magnolia Lumber Company, a partnership of Arkansas, was sued in Missouri, in the firm name only. One of its creditors was garnisheed and paid, in compliance with an order of the court, the amount of the debt toward a judgment rendered in the action against the Magnolia Lumber Company. The service upon which that judgment was based was constructive and in the firm name only. It was held that the judgment against the Magnolia Lumber Company was a nullity, it not having appeared, and was no protection to the garnishee. At page 633 the court said:

"Making application of the law to the conceded facts, it is very evident that the judgment against the appellant as garnishee in the *Luking* case was a nullity, for the reason that the justice rendering the judgment did not, as against the owners, acquire the right to dispose of the fund. In the absence of a statute authorizing it, a firm can only be sued in the individual names of its members. This rule rests on the principle that a firm has no legal existence apart from its members. It is a mere ideal entity. *Moore v. Burns*, 60 Ala. 269; *Halliday v. Doggett*, 6 Pick. 359; *Cushing v. Marston*, 12 Cush. 431; *Mexican Mill Co. v. Yellow Jacket Mining Co.*, 4 Nev. 40; *Rohrbough v. Reed Bros.*, 57 Mo. 292; *Fowler & Wild v. Williams*, 62 Mo. 403; *House v. Duncan*, 50 Mo. 453; *Beattie v. Hill*, 60 Mo. 72; *Comrades v. Spink*, 38 Mo. App. 309."

In the case of *Perry-Rice Grocery Co. v. Craddock Grocery Co.*, 34 Tex. Civ. App. 442, 78 S. W. 966, we have a situation much like that here involved. Action was commenced against Arbuckle Brothers, alleging it to be a corporation under the laws of New York. Service was made personally in New York by delivering process to one John Arbuckle, who appeared to be a member of a partnership called Arbuckle Brothers. Garnishment was issued and served upon Perry-Rice Grocery Company, a creditor of the partnership

in Texas. There was an attempt to amend the complaint by alleging that Arbuckle Brothers was a partnership composed of John Arbuckle and others, but without notice of such amendment to any of the partners. They did not appear. Judgments against Arbuckle Brothers and the garnishee were removed by the garnishee by writ of error to the court of Civil Appeals, contending that the judgment against Arbuckle Brothers as a partnership was a nullity for want of jurisdiction. In sustaining this contention, the court said:

"The original petition of which Arbuckle Brothers had notice, presented an action against them as a corporation, and by amendment the capacity in which they were sued was changed from that of corporation to a partnership. This was equivalent to the institution of a new suit, and defendants not having pleaded thereto, before a valid judgment can be rendered therein against them, service of such amendment must be had upon them. The seizure of a defendant's property by a writ of attachment or garnishment does not obviate the necessity of service of citation as provided by law in ordinary suits.

"It has been held in this state that the mere change of parties, such as an amendment which strikes out one of the plaintiffs or corrects the christian name, is not such a change in the character of the suit as would give the defendant the benefit of limitation. It has also been held that the mere addition of the name of one of the partners of a firm sued, whose name had been omitted in the original petition, the other plaintiffs remaining the same; or when suit is brought in the name of a nominal plaintiff for the use of another person, the substitution by amendment of the person for whose benefit the suit was originally brought, would not require the service of notice thereof on the adverse party. *Roberson v. McIlhenny*, 59 Texas 615; *Martel v. Somers*, 26 Texas 551; *Price v. Wiley*, 19 Texas 141. But where there is an entire change in the names of the plaintiffs, or the capacity in which the defendant is sued, service of such an amendment must be made upon the other party, or judgment taken against such new party will, in the absence of a voluntary appearance and answer thereto, be void."

See, also, *Sinsabaugh v. Dun*, 214 Ill. 70, 73 N. E. 390;

Smith v. Hoover, 39 Ohio St. 249; *Likens v. McCormick*, 39 Wis. 313.

The case last cited, because of the peculiar situation involved, did not present a question of jurisdiction; but we infer from the opinion of the court that had such question been involved, the judgment would have been held void for want of jurisdiction. The only case coming to our attention, which we regard as being opposed to this view, upon this precise question, is that of *Neiswanger v. Ord*, 81 Kan. 63, 105 Pac. 17, 29 L. R. A. (N. S.) 287. In that case, however, the full name of one of the partners appeared in the name of the defendant firm, thus showing there was at least one defendant having legal capacity to sue or be sued. Cases dealing with the question as one of jurisdiction are collected in a note to that case in 29 L. R. A. (N. S.) 287.

It is elementary that, in order to acquire jurisdiction by constructive service, the statute permitting such service must be strictly followed. *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462. And the mailing of process prescribed by such a statute "is as indispensable as any other step in the service, and without it the court can acquire no jurisdiction." 17 Ency. Plead. & Prac., 102. The mailing of process, addressed to the partnership, in the partnership name only, which at most is all that was done in this case, is not a mailing "directed to the defendant" as required by Rem. & Bal. Code, § 228, since the partnership is in no event the defendant. It could as well be said that the return of an officer, to the effect that he personally served a process upon a partnership by delivering it to the partnership, without naming the person to whom he delivered it, would show a service sufficient to support jurisdiction.

We are of the opinion that in the suit of Manufacturers' Furniture & Bedding Company, a corporation, against the Hefley-Coleman Company, a corporation, the superior court acquired no jurisdiction over the partnership consisting of W. J. Hefley and W. L. Coleman, and that therefore their

property could not be subjected to seizure or sale in that cause. The judgment is reversed, with directions to render judgment in favor of appellant, awarding him the property involved.

GOSE, FULLERTON, and MOUNT, JJ., concur.

[No. 9128. Department One. April 14, 1911.]

J. L. BEECHER, *Respondent*, v. PETER WILSON *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—FRAUD—EVIDENCE—SUFFICIENCY—CAVEAT EMPTOR. The rule of *caveat emptor* does not apply, and the vendee may recover damages for fraud in the sale of a shingle mill, where the evidence shows that the vendors employed gross deception to induce the sale, representing that the boiler was in first-class working condition and had never given any trouble, that when the property was inspected the boiler was fired up, and packed with stable manure in order to operate it at all, that it could not then be examined, or subjected to test without considerable expense, and that in fact the boiler had given constant trouble and was unfit for use and dangerous to operate.

VENDOR AND PURCHASER—FRAUD—DAMAGES—MEASURE—INTEREST. Upon the sale of a shingle mill through false representations concerning the boiler, which was in fact unfit for use and a loss to the vendee at the time of the sale, the vendee is entitled to offset against a note given for the balance of the purchase price the actual damage suffered, with interest from the date of the sale, at the rate prescribed in the note to evidence the indebtedness.

Appeal from a judgment of the superior court for Snohomish county, Canfield, J., entered March 16, 1910, upon findings in favor of the plaintiff, notwithstanding the verdict of a jury in favor of the defendants, in an action to foreclose a mortgage. Reversed.

Hathaway & Alston, for appellants.

Cooley & Horan, for respondent.

[1]Reported in 114 Pac. 899.

FULLERTON, J.—The appellants purchased of the respondent a shingle mill, consisting of certain buildings and machinery, and a leasehold interest in certain land on which the buildings containing the machinery were constructed. The purchase price agreed upon for the property was $4,000, all of which was paid in cash at the time of the purchase, except the sum of $1,800, to secure which a mortgage was executed upon the property by the purchasers. The purchasers subsequently paid the sum of $800 on the mortgage, but refused to pay anything more thereon, whereupon the present action was begun to foreclose the mortgage.

The complaint was in the usual form in such cases. The answer admitted the execution of the mortgage, but set out as a counterclaim that the boiler, being a part of the property purchased from the respondent, was old, worn, and leaky, incapable of being repaired, and totally unfit to be used for the purposes for which it was purchased, or for any purpose whatsoever; that the appellants were compelled to discard it because of its condition, and compelled to install a new one in its place, to their cost and damage in the sum of $912.50. They further alleged that, at the time of making the purchase, the respondent represented and warranted the boiler to be sound and in good repair, when in truth and in fact he well knew the condition of the boiler, and that his representations concerning the same were false. The reply put in issue the affirmative matter in the answer, and on the issue made, a trial was had before the court and a jury, which resulted in a verdict of the jury to the effect that the appellants were entitled to an offset against the balance claimed to be due on the mortgage of $535.65. The court, however, disregarded the findings of the jury, and made findings of its own to the effect that, while the respondent had made false representations concerning the condition of the boiler, the appellants, at the time they purchased the property, had an opportunity to examine the boiler; that they were experienced mill men; and that an inspection of the boiler by them would

have disclosed its condition. The court thereupon concluded that the rule of caveat emptor applied, and that the respondent was entitled to foreclose the mortgage for the full purchase price. A decree was entered accordingly, and this appeal taken therefrom.

The evidence discloses that the grossest kind of deception was practiced by the respondent in order to induce a sale. The boiler was fired up and the mill in operation at the several times the appellants examined the property prior to its purchase by them. The boiler in that condition could not be examined minutely and it was made a special subject of inquiry by the appellants. In answer to these inquiries, the respondent assured them that the boiler was in first-class working condition; that it had been subjected to a test of one hundred and fifty pounds cold water pressure; and that he had never had any trouble with it. The truth was that the boiler had been giving trouble all of the time; that it was so far old, worn and leaky that it could not be operated at all when in a natural condition, and that the respondent to operate it at all had been compelled to pack it with stable manure.

Furthermore, the appellants were compelled to discard the boiler at once, not only because it was unfit for use, but because an attempt to use it was dangerous to the operators working in the mill.

These facts warrant a different judgment from that entered by the trial court. The purchase made by the appellants was not a purchase in market overt. It is not even an ordinary case of bargain and sale. Here the appellants were purchasing a considerable plant, for a particular purpose, and the suitableness of the property for that purpose was a prime consideration. The boiler was not an article the condition of which could be ascertained by inspection, no matter how carefully such inspection be made. To ascertain its condition it was necessary to put it through certain tests which could not be done without taking it into control, the expenditure of considerable time in the work, and the incur-

rence of some cost. These facts bring the case within the rule of liability. By the weight of authority, and in reason, the rule that a person who is voluntarily blind as to facts concerning which false representations are made cannot complain of the same, applies only where the person has a present opportunity and means of ascertaining the facts; it does not apply merely because it is possible for him to ascertain the facts. *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880; *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753.

It remains to consider the amount of the offset that should be allowed the appellants. As to this we think the verdict of the jury closely approximates the actual damage suffered by them, and we shall adopt their finding as the true amount to be so allowed. Since the loss to the appellants occurred at the time of the sale, this sum should be deducted from the unpaid balance of the purchase price, and a recovery allowed the respondent for the amount remaining due after such sum is deducted, plus interest at the rate prescribed in the note given to evidence the indebtedness. The attorney's fee allowed will be reduced from $150 to $75. Costs of the court below to the plaintiff. The appellants will recover their costs in this court. The judgment is reversed, and the cause remanded with instructions to enter a decree accordingly.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9236. Department One. April 14, 1911.]

H. L. KLOCK, *Respondent*, v. H. D. NEWBURY, *Appellant*.[1]

SALES—RESCISSION—WAIVER. Repairs on a touring car, which did not materially change its condition, do not waive the purchaser's right to rescind the sale for breach of warranty.

SAME—ESTOPPEL. An offer by the purchaser of a touring car to permit the seller to put the car in order, not accepted by the seller, does not estop the purchaser from rescinding the sale for breach of warranty.

SALES — WARRANTY — CAVEAT EMPTOR—OPPORTUNITY TO INSPECT. The rule of *caveat emptor* does not apply to the sale of a motor car under an express written warranty that it was in first-class condition, even if the purchaser had an opportunity to inspect it.

SAME—RESCISSION BY VENDEE—DILIGENCE—PLEADING. A complaint for a rescission of a contract of sale for breach of warranty is sufficient without stating facts showing the exercise of ordinary care by the plaintiff to discover the defects, where the defects were latent, or it does not appear on the face of the complaint that the defects could have been discovered by the exercise of ordinary care.

SALES—RESCISSION—TENDER. Upon rescission of the sale of a motor car, returning it to the garage where the delivery was made, with a written order for it, constitutes a sufficient tender.

SAME. The tender of a motor car, on rescission of the sale, is not objectionable because the car was dismantled, where the seller sanctioned the dismantling in order to repair the car and make it comply with his warranty.

SALES—WARRANTY—BREACH—FRAUD. An executed contract of sale may be rescinded for breach of express warranty without proof of fraud on the part of the seller in making the sale.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 11, 1910 upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

James B. Murphy and *Milo A. Root*, for appellant.

S. H. Steele, for respondent.

[1]Reported in 114 Pac. 1032.

FULLERTON, J.—The respondent, plaintiff below, brought this action against the appellant to rescind a contract of sale. In his complaint the respondent alleged, in substance, that on June 9, 1909, he purchased from the appellant a certain Wayne Touring car for the sum of $1,025, and received from the appellant, on the delivery of the car, a bill of sale and warranty in the following form:

"Seattle, June 9th, 1909.

"I, H. D. Newbury, hereby sell outright to H. L. Klock, one sixty horsepower Wayne Touring car; I hereby represent and guarantee the machine to be in first class order.

"H. D. Newbury."

He then alleged that, after receiving the car and paying the purchase price, he discovered that the car was not a sixty horse power car, nor in first-class order, but was rated by the manufacturer as a fifty horse power car only, and was so far out of order that it could not be operated with safety, enumerating some eleven different particulars wherein he found the car defective. He further alleged that he made some minor repairs to the car at a cost to himself of $49.90, while attempting to put the car in order; that he did not succeed therein, and called upon the appellant to put the car in order, but that the appellant neglected and refused so to do; and finally, on June 19, 1909, he tendered a return of the car to the appellant and demanded a return of the purchase price. He also alleged want of knowledge on his part of the defective condition of the car at the time he purchased it; that the appellant well knew of its defective condition at that time; and that the appellant deceitfully and fraudulently made the warranty as to the condition of the car for the purpose of cheating and defrauding the respondent. The prayer of the complaint was for a rescission of the contract and for the recovery of the purchase price paid, together with $49.90 paid for repairs, and fifty dollars alleged to have been suffered as damages because of time lost in an attempt to operate the car. The answer was in effect a general denial. The trial,

which was had without the intervention of a jury, resulted in findings and a judgment in favor of the respondent for a rescission of the sale and the recovery of the purchase price with interest. This appeal followed.

It is first contended that the complaint is not sufficient to support a decree of rescission because it contains allegations which are sufficient in law to show an election on the part of the appellant to keep the car, and to estop him from claiming the right to rescind. This contention is founded on the allegations of the complaint to the effect that the appellant expended $49.90 in repairs on the car, and repeatedly called upon the appellant to put it in order before he elected to rescind. But we think the contention untenable. Had the respondent, by the repairs made to the car, substantially changed its condition so that it could not be returned to the seller in the condition in which it was received, the objection would have validity, but if the repairs did not effect a material change in the car, or substantially alter its condition, there is no reason why it could not be lawfully returned to the seller, and in so far as the complaint shows, there was no such alteration or change.

Nor did the fact that the purchaser offered the appellant an opportunity to make good his guarantee waive the right. The offer was not accepted by the seller, and his position with reference to the sale was in no manner affected thereby. Voluntary acts on the part of the purchaser of a chattel under a warranty of condition, which will operate as an estoppel of the right to rescind, must be such as affect the seller and cause a change in his situation with reference to property, making it inequitable to enforce the remedy. Offering the seller an opportunity to make good his warranty does not change the situation of the seller with reference to the property, and so far from being censurable and the waiver of rights under the contract, the practice is commendable.

A second objection to the complaint is that it is not alleged therein that the respondent had no chance to know about the

condition of the machine before paying for it. But the doctrine of caveat emptor has no application when there is an express warranty of condition, such as there was in this case. The plaintiff alleges that he had no actual knowledge of the defective condition of the car, and it is not enough to defeat the action on the seller's express warranty to show that he had an opportunity to examine and failed to exercise it. The cases of *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938, and their kindred cases, cited and relied upon by the appellant, were not cases upon express warranties. In each of these cases the purchaser sought to rescind because of false representations made by the seller to him to induce the purchase, and it was held the purchaser could not rescind because of the false representations when the opportunity was presented him to ascertain the condition of the thing purchased and the falsity of the representation before the purchase was completed. But it was not held, nor intended to be held, that a purchaser may not rely upon the express written warranty of the seller as to the condition of the article purchased by him, even though he had the opportunity to ascertain for himself the condition of the article.

It may be doubted also, we think, whether the question here suggested can be raised in this instance by an objection to the complaint. The rule of nonliability for false representations as to the condition of an article is applicable only in those cases where the defect is patent, and can be ascertained by the exercise of ordinary care and prudence. The defects pointed out in the complaint here were so far latent as to require a dismantling of the car to ascertain them. We do not think the purchaser would have to go that far in order to recover for false representations as to the condition of the car. But at any rate, before a complaint could be said to be so far defective as not to state a cause of action for a rescission, on the ground of want of the exercise of ordinary care in failing to discern defects in the article purchased, it

must appear on the face of the complaint that the defect was one that could have been discovered by the exercise of ordinary care; it is not enough that the complaint is silent as to the fact.

It is next objected that there was no sufficient tender of a return of the machine to authorize a decree of rescission, the precise objections being that it was not tendered to the appellant personally, and was in a somewhat dismantled condition when the tender was made. The delivery to the respondent, at the time of the purchase, was made at a garage where the appellant kept the car when not in use. The tender of a return of the car was made at the same place, that is to say, the respondent returned the car to the garage and gave the appellant a written order for it. This was sufficient under the circumstances. When the article desired to be tendered is of such bulk and weight that it cannot be taken into the bodily presence of the person to whom it is desired to tender it, it may be deposited in some public warehouse, or with some concern making it a business to store and keep such articles, and give the person to whom it is desired to be tendered a written order on the depository for its delivery. Of course the charges for storing or keeping the article, if any, must be paid up to the time the order of delivery is given, and for such reasonable time thereafter as may be necessary to remove the article, but there is no question on this score in the present case. The objection that the car was in a dismantled condition has no force in the case at bar owing to the peculiar facts of the case. The dismantling was done with the appellant's sanction in order that he might have such repairs made as would make the car comply with his warranty, and it was tendered to him in the shape it was left after he refused to make further repairs thereon.

It is next contended that the respondent has mistaken his remedy. That a buyer cannot, in the absence of fraud on the part of the seller, or an agreement giving him the right, rescind an executed contract of sale for a breach of warranty,

his remedy in such a case being an action for damages; it being contended further that, although it was alleged, and the court found, otherwise, there is no evidence of fraud on the part of the appellant. While there is a conflict of authority on the question here suggested, we think the better rule is against the contention that fraud in making the sale, on the part of the seller, must be shown before an executed contract of sale can be rescinded for breach of warranty. A chattel is usually purchased for a specific use, and if it proves unfit for that use because it is not in the condition the seller warranted it to be in, the result to the purchaser is the same whatever may have been the intent of the seller. And since the law affords a remedy to the purchaser because of the injury that is done him by the breach of the contract of sale, it would seem that the remedy ought to be enforced without instituting an inquiry as to the intent with which the seller acted. Intent is material inquiry where smart money, or some form of punishment of the guilty party is a part of the remedy; but the inquiry can have no place in an action where the sole purpose is compensation for the injury inflicted. *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. 670; *Timken Carriage Co. v. Smith & Co.*, 123 Iowa 554, 99 N. W. 183; *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925; *Womach v. Case Threshing Mach. Co.*, 62 Wash. 661, 114 Pac. 509.

The question, therefore, whether there was fraud in making the sale, on the part of the seller, is not material, and we need not inquire whether the evidence supports the finding of the court to that effect.

The other errors assigned need no special consideration. The judgment is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9101. Department One. April 17, 1911.]

ALEXANDER PANTAGES, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

EVIDENCE—PHOTOGRAPHS—IDENTIFICATION—NECESSITY. Upon the second trial of a cause, it is error to admit in evidence a newspaper photograph of the scene of the accident upon the statement of the trial judge that he recognized it as a duplicate of an exhibit used on the former trial and identified by evidence on the former trial, where there was no evidence identifying the same as a duplicate of the exhibit in question, and it was concededly not such duplicate.

APPEAL AND ERROR—REVIEW—RECEPTION OF EVIDENCE—MISCONDUCT OF JUDGE—PREJUDICE. The erroneous admission of an unidentified photograph of the scene of the accident is so prejudicial as to require a reversal, where undue prominence was given to it by statements of the trial judge declaring it to be identical with an exhibit used on a former trial, when it was not, and manifesting uncalled for feeling and accusing appellant's counsel with bad faith.

STREET RAILROADS—COLLISION WITH AUTOMOBILE—USE OF STREETS—INSTRUCTIONS. In an action for damages to an automobile in a collision with a street car, it is proper to refuse instructions to the effect that the owner of the automobile could not recover if the automobile was being operated on the street car tracks at a time when it was unnecessary to do so and when a car might be expected at any time; since he may lawfully use any part of the street convenient for his use, if not in the immediate use of another.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 13, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained through the collision of an automobile and a street car. Reversed.

James B. Howe and *Hugh A. Tait*, for appellant.

John E. Ryan and *E. M. Stanton*, for respondent.

FULLERTON, J.—The appellant owns and operates a street railway system in the city of Seattle. The respondent owns an automobile, and while being driven therein, collided with

[1]Reported in 114 Pac. 1044.

one of the appellant's cars. The effect was to demolish the automobile and slightly injure the respondent. This action was brought to recover damages for the injury suffered. There was a former trial of the cause in which the respondent recovered a judgment, which, on appeal to this court, was set aside for errors occurring at the trial. *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629. After the cause had been remanded, a second trial was had, which also resulted in a verdict and judgment for the respondent. This appeal is from the last mentioned judgment. The errors assigned will be noticed in their order.

On the first trial a Mrs. Goss was called as a witness on behalf of the respondent, and after testifying to having been a witness to the collision, gave a detailed description of the manner of its occurrence as it appeared to her. She further testified that, some time after the accident, while she was standing in the doorway of her residence, some one took a photograph of the wrecked automobile. She did not know who took the photograph and never saw it after it was taken, but was shown a newspaper clipping containing a picture of what purported to be a scene of the wreck, and said that it was a reasonably correct representation of the scene as she remembered it. On the second trial Mrs. Goss could not be produced as a witness, and counsel stipulated that the testimony she gave on the former trial might be read to the jury from the record of that trial, subject to all legal objections. While her testimony was being read, it was discovered that the clipping which the witness identified was not with the record from which the counsel conducting the trial was reading, but was in fact among the files of the appellate court, having been sent there as a part of the record on the former appeal. Counsel thereupon produced a clipping from a newspaper showing a picture of a wrecked automobile, and offered it in evidence as being similar to the picture identified by the witness in her testimony given at the former trial. To the offer counsel for the appellant objected, whereupon counsel

for the respondent stated that he would supplement the offer by further proof. He then called one E. M. Stanton as a witness, when the following occurred:

"Q. (By Mr. Ryan, counsel for respondent). You are an attorney at law? A. Yes, sir. Q. I will ask you Mr. Stanton, to examine this instrument marked 'Plaintiff's Exhibit B for Identification,' and tell the court and jury whether or not you have seen that before. A. I cut this out from the issue of the evening Times of December 4, 1907. Mr. Ryan. I will ask the court to examine this, as the court has in mind the other exhibit. The Court. I remember the other exhibit and this is simply the same thing that was admitted on the other trial. Mr. Tait (Counsel for appellant). There is no proof of that, your honor. The Court. The court says it is so. Mr. Ryan. Let the record show that the exhibit was passed to the court for his examination. The Court. The court says he remembers it was the one on the other trial. Mr. Tait. Now, if your honor please, I desire to reserve an exception to your honor's statement that this is the same photograph that was—or rather cutting from the newspaper that was received on the other trial. The Court. That is all right; you can impeach the court if you want to; you will have that opportunity given you. Mr. Tait. I have not any such idea as that in mind at all. The Court. I know it is the same one. I don't care a snap. Mr. Tait. My objection to its introduction is overruled? The Court. Yes. Mr. Tait. I may be permitted to have an exception? The Court. Yes. Furthermore, you know it is the same one. (Paper received in evidence and marked 'Plaintiff's Exhibit B.')"

The appellant complains not only of the ruling of the judge in admitting the newspaper cut in evidence, but of his conduct and remarks when making the ruling. It has seemed to us that the complaint is just. It is manifest that the newspaper cut was not admissible as evidence in the connection in which it was offered. It was not the cut identified by the witness at the former trial from whose testimony counsel was reading, nor was it shown to be a cut taken from the same edition of the newspaper from which the other was taken. Had it been shown to be so taken and an exact duplicate of the cut

identified by the witness, no serious objection could have been urged to its admission. But unless it was shown to be the one originally identified by the witness, or an exact duplicate of such original, it could not properly be admitted in evidence. Counsel argue, however, that it was a matter which the court could judicially know, since a court may "assume judicial knowledge of facts which he has learned . . . at an earlier hearing of the same case." But conceding that this rule is applicable to an instance of this kind, it cannot be said that the judge presiding at this trial learned at the first trial that this particular cut was a duplicate of the one there identified by the witness. That question did not arise at the first trial. No duplicate of the document identified by the witness was sought to be introduced. That question arose for the first time on the last trial, and no opportunity had been afforded the court to know judicially that the one newspaper cut was a duplicate of the other. Moreover, although the judge may have meant otherwise, he did not identify the instrument as a duplicate of the original introduced at the other trial. He stated that it was "the one on the other trial," "I know it is the same one." "Furthermore, you [addressing counsel] know it is the same one." That it was not the same one is now confessed on all sides.

Counsel argue further, however, that the wrongful admission of the picture in evidence is so far immaterial that it ought not to be regarded as reversible error, since there is nothing tending to show directly that the appellant's case was prejudiced thereby. Were the erroneous admission of the instrument alone in question, we would be inclined to accept this view, as the cause has been twice tried to a jury with practically the same result, but we cannot overlook the comments of the court when making the ruling complained of. We fear these remarks made the error prejudicial by bringing the question at issue into too great prominence. The record not only shows that the judge manifested a feeling seemingly uncalled for by the very mild protests made by

counsel, but went further and accused counsel of bad faith, when counsel was entirely right in his contention and the judge wholly in error. This we think was so far prejudicial as to require a new trial.

Of the instructions requested by the appellant, the only one necessary to be specially noticed is the following:

"You are further instructed that if you find that the automobile, prior to the accident, was being operated upon the track upon which defendant's car was being operated at a time when it was unnecessary so to do, and at a time when a car coming in the opposite direction might be expected at any moment, and you further find that the fact that the automobile was being operated upon such track contributed to the injury, without which the same would not have happened, and was also open and apparent to the plaintiff, then you are instructed that the plaintiff was guilty of such contributory negligence as to bar his recovery, and your verdict must be for the defendant."

We think the refusal to give the instruction was not error. To announce the rule therein defined as law would be to hold that nothing but necessity would justify the use of that part of a street covered by street car tracks while the line was being operated. This is not the rule. A traveler on a public street may lawfully use any part of the street he pleases when the same is not in the immediate use of another, even though there is no other requirement for him so to do than that of convenience. He must realize, of course, that in so far as street cars are concerned, they can travel over only a given space, and that he must avoid this space on the approach of a car. But his right to use any part of the street, when not in use by a car, is not to be governed by the question of necessity.

For the error mentioned, the judgment is reversed and a new trial awarded.

DUNBAR, C. J., MOUNT, PARKER, and GOSE, JJ., concur.

[No. 9239. Department One. April 17, 1911.]

K. J. H. ASPLUND, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

RAILROADS—FIRES—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Whether a pile of cordwood, 135 feet distant from defendant's railroad tracks, was burned by a fire set by a defective or negligently operated locomotive, is for the jury, where there was evidence that the fire started in the early morning, that no fire was discernible in the vicinity as late as 10 o'clock the evening before, that defendant's locomotive passed at 3:15 in the morning, that sparks of sufficient size frequently escaped from the defendant's engines and were thrown considerable distances, and that fires therefrom were a common occurrence during the dry season; notwithstanding that negligence was rebutted by evidence as to the condition and operation of the engine which presumably caused the fire.

SAME—EVIDENCE OF OTHER FIRES—ADMISSIBILITY. Evidence of other fires set out by other engines at other times is admissible, as tending to show negligence by a fire set by a particular engine; where the emission of sparks and setting of fires was a matter of frequent occurrence.

APPEAL—RECORD—INSTRUCTIONS. Error cannot be predicated upon the instructions to the jury, where they are not set out in the record.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered July 11, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover damages for loss of property destroyed by fire. Affirmed.

F. V. Brown and *Frederic G. Dorety*, for appellant.

McBurney & Cummings, *H. McC. Billingsley*, and *C. C. Cutler*, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant to recover the value of certain wood destroyed by fire on May 7, 1909. He alleged that the fire escaped from one of the appellant's engines because of the defective condition of the engine and the careless and

[1]Reported in 114 Pac. 1043.

negligent manner in which it was operated. There was a recovery in the court below, and the railroad company has appealed.

The evidence of the respondent tended to show that the wood burned consisted of some 396 cords, which was piled in a compact pile about 135 feet distant from appellant's railway tracks. The country surrounding the wood pile was comparatively level, with a slight upgrade towards the north. The roadbed of the appellant was somewhat elevated at this place, its height above the natural level of the surrounding country being variously estimated by the witnesses to be from seven to fourteen feet. The fire occurred in the early morning of the day. It was first seen by the engineer of one of the appellant's trains which passed the place at about 4:24 o'clock on the morning of May 7th. At about 5 o'clock it was discovered by two of the respondent's neighbors, who testify that at that time a considerable part of the pile had been consumed. The owner discovered the fire between 7 and 8 o'clock in the morning, at which time the wood was practically all burned. It was testified, by persons living in the vicinity of the place of the fire, that no fire was discernible in the neighborhood of the wood pile as late at 10 o'clock p. m. of the day before the fire, and the engineer of one of the trains of the appellant which passed the place at about 3:15 o'clock on the morning of the fire testified that he saw no fire or anything unusual in the neighborhood at that hour. It was also testified that sparks of sufficient size to cause a fire frequently escaped from the appellant's engines, and were thrown for considerable distances from its tracks; that, but a few months before the fire occurred in the respondent's wood pile, fire escaping from a freight engine operated by the appellant had burned a haystack of a neighbor of the respondent, the stack being 183 feet distant from the track; that about five days prior to the fire another wood pile of the respondent's had been burned by fire, escaping from one of the appellant's engines, and several witnesses testified to the fact that, during

the dry season of the year, it was a common occurrence for appellant's engines to start fires in the inflammable debris lying on and alongside of its right of way.

The foregoing is an epitome of substantially all of the evidence tending to show the cause and origin of the fire. It is the appellant's contention that it fails to make a case for the jury, for two reasons; first, it does not show that the fire which burned the wood escaped from any of the appellant's engines; and, second, that if by any inference it can be said that it could have escaped therefrom, that it fails to show that the escape was because of any negligent act or omission on its part. But without following the somewhat extended argument of the appellant in detail, we are convinced that there was here sufficient evidence of the appellant's liability to require the submission of the question to the jury. The evidence showed that fire did repeatedly escape from the appellant's engines, and by the elimination of other sources from which the fire could have originated, it was made a reasonable inference that some one of the appellant's engines was the source of the fire. The fact, also, that fires repeatedly occurred from the engines, tended to show negligence either in their construction or operation. True, the appellant sought to overcome these proofs by showing that its engines were in good condition and were properly operated, particularly the engine passing at 3:15 in the morning, which presumably caused the fire, but this was only the rebuttal of evidence by evidence, which made a question for the jury and not one for the court.

It is contended that evidence of fires set by other engines was inadmissible, since it was shown that a particular engine caused the fire in question. But such is not the rule, nor was it so held in *Noland v. Great Northern R. Co.*, 31 Wash. 430, 71 Pac. 1098, cited and relied upon. In that case it was said, by way of illustration, that evidence of other fires by other trains at other times than the one in question was not admissible where a specific engine was designated in the complaint

as having caused the fire, but it was held proper to show the fact that the defendant's engines were in the habit of emitting sparks, in the absence of such an allegation. The case is authority for the rule followed by the trial court, therefore, rather than against it.

Objection is made to the instructions of the court, but the instructions as given by the court are not set out in the record; and we cannot, for that reason, review the questions argued. The judgment is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

[No. 9293. Department One. April 17, 1911.]

In the Matter of the Estate of FRANCIS M. GUYE.

ELIZA W. P. GUYE, *Respondent*, v. JOHN W. GUYE *et al.*, *Appellants*[1]

EXECUTORS AND ADMINISTRATORS—ALLOWANCES TO WIDOW—JURISDICTION—NONINTERVENTION WILL—WITHDRAWAL OF ESTATE FROM ADMINISTRATION. The probate court has no jurisdiction to order an allowance to a widow, upon the settlement of an estate under a "nonintervention" will, within Rem. & Bal. Code, § 1444, authorizing such settlement without the intervention of any court; and the statutory provisions with reference to the widow's use of the homestead and other articles, exemptions, and a money allowance, in the case of estates settled through probate proceedings have no application; the two methods of settlement being distinct.

Appeal from an order of the superior court for King county, Frater, J., entered October 14, 1910, granting to a widow an allowance out of an estate being administered under a nonintervention will, after a hearing on the merits before the court. Reversed.

Higgins, Hall & Halverstadt, for appellants.

Blaine, Tucker & Hyland, for respondent.

[1]Reported in 114 Pac. 1041.

FULLERTON, J.—On May 25, 1908, one Francis M. Guye, a resident of King county, Washington, died therein, leaving an estate consisting of real and personal property. He left a will by which he disposed of all of his estate, naming the appellants, John W. Guye and Rolland H. Denny, as executors thereof. The will is what is known as a nonintervention will, and contained the following clause:

"I will and direct that my estate shall be settled in the manner provided in this my last will and testament; that no bond or bonds shall be required of my said executors and trustees, in either capacity; that neither letters testamentary nor of administration shall be required by my said executors, or either of them, and that it shall not be necessary for them, or either of them, to take out letters testamentary or of administration, but they, or either of them, shall have this my last will and testament duly probated and shall file a true inventory of all the property of my estate, in the manner required by existing laws, and after the probate of this will and the filing of such inventory, my said estate shall be managed by my said executors and trustees, and the survivor of them, or in case only one of them qualify, then by such one, and settled without the intervention of any court."

The statute relating to nonintervention wills is found in Rem. & Bal. Code, at § 1444, and reads as follows:

"In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, and where it also duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, which fact may be established by an order of the court on the coming in of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so provide: But provided, that in all such cases the claims against such estates shall be paid within one year from the date of the first publication of notice to cred-

itors to present their claims, unless such time be extended by the court, for good cause shown, for a reasonable time: Provided, however, In all such cases, if the party named in such will as executor shall decline to execute the trust, or shall die or be otherwise disabled from any cause from acting as such executor, then letters testamentary or of administration shall issue as in other cases: And provided further, If the party named in the will shall fail to execute the trust faithfully and to take care and promote the interests of all parties taking under the will, then, upon petition of a creditor of such estate, or of any of the heirs, or of any person on behalf of any minor heirs, it shall be the duty of the court of the county wherein such estate is situated to cite such person having the management of such estate to appear before such court, and if, upon hearing of such petition it shall appear that the trust in such will is not faithfully discharged, and that the parties interested, or any of them, have been or are about to be damaged by such actual doings of the executor, then letters testamentary or of administration shall be had and required in such cases, and all other matters and proceedings shall be had and required as are now required in the administration of estates, and in such cases the costs of the citation and hearing shall be charged against the party failing and neglecting to execute the trust as required in such will."

The executors named in the will accepted the trust, and thereupon took such steps as were necessary under the statute to establish their rights to manage and settle the estate without the intervention of the court. After this had been done, the respondent, who is the widow of decedent, petitioned the court before whom the probate proceedings were had for an allowance out of the estate, and sought to bring the executors before the court by serving upon their attorneys a copy of the petition, together with a notice signed by her own attorneys reciting that the petition would be called for hearing before the court at a time named therein. The executors, at the time appointed, appeared specially and moved to quash the proceedings for want of jurisdiction over their persons and over the subject-matter. The motion to quash was heard

by a court commissioner, who dismissed the application for the reasons stated in the motion to quash. A demand for revision of the order of the commissioner was thereupon sued out, and on the hearing thereon before the superior court, the order of dismissal entered by the court commissioner was reversed and the petition reinstated. The executors thereupon, still preserving their special appearance, answered the petition. Thereafter the petition was heard upon its merits, at the conclusion of which the court made a money allowance to the widow of $1,500, and directed the executors to pay her out of the funds of the estate $150 per month until the further order of the court. The executors appeal.

The appeal presents but a single question, namely, the jurisdiction of the court to make the order from which the appeal is taken. It has seemed to us that it was without such jurisdiction. The statute in clear and explicit terms provides that certain estates under certain conditions can be managed and settled without the intervention of the court sitting in probate, and the record before us makes it clear that this is one of the estates that fall within the statute. If this statute is to have force and effect, there can be but one conclusion drawn therefrom; namely, the superior court sitting in probate has no jurisdiction to make orders with reference thereto. But counsel for the respondents, if we understand their argument, contend that there are other statutes relating to the administration of estates in *pari materia* with the one in question, which must be construed in connection with it, and when so construed, materially modify its seemingly direct provisions. The statutes cited are those relating to the right of the widow and minor children of the deceased to remain in possession of the homestead of the deceased, their right to have possession of the wearing apparel of the family and the household utensils, to have set apart to the use of themselves without cost such property of the deceased as was exempt from execution, to have a money allowance of the estate for their support, and the kindred statutes regulating the due ad-

ministration of estates when the proceedings are had through the probate court. But plainly these statutes have no application to cases such as the one at bar. As we said in *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253, our statutes provide two distinct methods of settling an estate under a will. One method is to probate the will under the direction of a court having jurisdiction in probate, and the other to settle it in the manner provided by the will, through an executor named in the will, without the intervention of the probate court. In the former method, the statutes cited by the appellant have full force and effect and govern the proceedings. But they have no application to the latter method. What sums shall be taken from the estate for the support of the widow and the children must be determined by the executors themselves in the first instance. It may be that should an allowance be refused by the executors, or should the amount allowed by them prove inadequate, the court, in the exercise of its equity powers, could afford relief; but such relief must be granted in a suit or action brought in the regular way; it cannot be granted by the court in the exercise of its probate powers.

The question of the right of the executor to administer upon the estate of his decedent under a nonintervention will is not a new one in this state. Indeed, the statute authorizing such a will has been on the statute books since early territorial days, and has uniformly been construed to confer upon the executors of a will drawn pursuant to its provisions the right to execute the trust without interference on the part of the court, except, of course, upon the happening of some one or more of the conditions provided in the statute itself which specially authorize such interference. The following cases bear more or less directly thereon: *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428; *Miller v. Borst*, 11 Wash. 260, 39 Pac. 662; *Smith v. Smith*, 15 Wash. 239, 46 Pac. 249; *Walla Walla v. Moore*, 16 Wash. 339, 47 Pac. 753, 58 Am. St. 31; *Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337;

State ex rel. Cox v. Superior Court, 21 Wash. 575, 59 Pac. 483; *Boyer v. Robinson*, 26 Wash. 117, 66 Pac. 119; *Seattle v. McDonald*, 26 Wash. 98, 66 Pac. 145; *In re Macdonald's Estate*, 29 Wash. 422, 69 Pac. 1111; *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721, 70 Pac. 138; *Sprague v. Betz*, 44 Wash. 650, 87 Pac. 916; *Foley v. McDonnell*, 48 Wash. 272, 93 Pac. 321; *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087; *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1027; *Shufeldt v. Hughes, supra.*

The trial court being without jurisdiction to make the order appealed from, it is ordered that its judgment be reversed, and the cause remanded with instructions directing it to refuse the application for an allowance.

DUNBAR, C. J., MOUNT, PARKER, and GOSE, JJ., concur.

[No. 9220. Department One. April 17, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. HARVEY SMAILS, *Appellant*.[1]

PERJURY—INFORMATION—SUFFICIENCY—CHARGING FALSITY OF TESTIMONY. An information for perjury sufficiently negatives the truth of the false testimony when it sets out the false testimony, and asserts its falsity by negation and by setting out the true facts.

SAME—ACCUSED'S KNOWLEDGE OF FALSITY. An information for perjury sufficiently charges the accused's knowledge of the falsity of his testimony where it charges that he wilfully, knowingly, and falsely testified to a certain state of facts with knowledge of each fact alleged to negative the truth thereof.

EVIDENCE—EXPERTS—OPINIONS—FORGERY. Bankers and accountants of long standing having an extended experience in dealing with commercial paper and detecting irregularities therein are qualified to express their opinions as to the forgery of a note and mortgage.

SAME—EXPERT TESTIMONY—SUBJECTS—FORGERY BY ADDITIONS. It is competent for experts to express an opinion as to whether certain words and figures upon a note and mortgage were added or written at a different time, with a different pen or ink or under different circumstances from the other parts of the writing thereon.

[1]Reported in 115 Pac. 82.

PERJURY—EVIDENCE—SUFFICIENCY. A conviction of perjury is sustained by the direct testimony of one witness and corroborating circumstances established by independent evidence of such a character as to clearly turn the scale and overcome the oath of the defendant and the legal presumption of innocence.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL. Prejudicial error cannot be predicated on an improper insinuation of the prosecuting attorney on cross-examination of the defendant's witness, where an objection thereto was promptly sustained and the jury were instructed to disregard it.

CRIMINAL LAW—APPEAL—RECORD—MISCONDUCT OF COUNSEL. Error cannot be predicated upon improper argument of counsel to the jury, where it was not preserved in the record on appeal, and no motion was made below to strike it or to instruct the jury to disregard it.

CRIMINAL LAW—RECEPTION OF EVIDENCE. A witness should not be permitted to state his impression after he had testified that it was so long ago that he could not swear to the answer to the question.

CRIMINAL LAW—TRIAL—INSTRUCTIONS AS LAW OF CASE—PERJURY. Where, upon a trial for perjury, the court instructed the jury that all the testimony given by the accused in a civil action was material to the issue thereon, and the same was not excepted to, it became the law of the case, and error cannot be predicated on other instructions authorizing the jury to convict if they find that the accused gave the testimony as charged or "some substantial part of it."

CRIMINAL LAW—TRIAL—MISCONDUCT OF WITNESS—TIME FOR OBJECTION. An objection that the regular superior court judge of the county, who was a witness for the state, was guilty of improper conduct in mingling with the other witnesses and manifesting an interest in the prosecution, comes too late when first made on motion for a new trial.

CRIMINAL LAW—NEW TRIAL—TIME FOR MOTION. A second motion for a new trial, made after appeal taken and pending the hearing in the supreme court, is untimely and cannot be considered.

Appeal from a judgment of the superior court for Walla Walla county, Miller, J., entered May 4, 1910, upon a trial and conviction of perjury. Affirmed.

Zent & Cannon and *Sharpstein & Sharpstein*, for appellant, to the point that the witnesses were not competent to testify as experts or to give their opinions as to the age or date of

the writings, cited: *Ferguson v. Hubbell*, 26 Hun 250; *Jewett v. Draper*, 6 Allen 434; *Cheney v. Dunlap*, 20 Neb. 265, 29 N. W. 925, 57 Am. Rep. 828; *Jones v. Tucker*, 41 N. H. 546; *Clark v. Bruce*, 12 Hun 271; *Ellingwood v. Bragg*, 52 N. H. 488; *Pearson v. Alaska Pacific Steamship Co.*, 51 Wash. 560, 99 Pac. 753, 130 Am. St. 1117; *Williams v. Clark*, 47 Minn. 80, 49 N. W. 398; *In re Rockey's Estate*, 155 Pa. St. 453, 26 Atl. 656; *Collins v. Crocker*, 15 Ill. App. 107; *Taylor v. Town of Monroe*, 43 Conn. 36; *New England Glass Co. v. Lowell*, 7 Cush. 319; *Schwander v. Birge*, 46 Hun 66; *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245; *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293; *Ryder v. Jacobs*, 182 Pa. St. 624, 38 Atl. 471.

Everett J. Smith, for respondent.

FULLERTON, J.—In February, 1910, the appellant Smails was informed against by the prosecuting attorney of the county of Walla Walla, for the crime of perjury in the first degree, the charging part of the information being as follows:

"Everett J. Smith, prosecuting attorney of and for the county of Walla Walla, in the state of Washington, on behalf of said state accuses Harvey Smails of the crime of perjury in the first degree, and informs the court that at the courthouse in Walla Walla, the county seat of said county, on the 12th day of January, 1910, in and before the superior court of said state for said county, there came on for trial a certain civil action between one Maude Aubian, as plaintiff, and Harvey Smails and John D. Walter, as defendant, for the annulment and cancellation of a certain instrument purporting to be a mortgage upon certain lands situate in said county and owned, or alleged to be owned by the said Maude Aubian, to secure the payment by her, the said Maude Aubian, to the said Harvey Smails of a certain promissory note for the principal sum of twenty-two hundred and fifty dollars, upon which trial it became and was a material question whether the said note and mortgage were made, signed, executed, acknowledged and delivered to him, the said Harvey

Smails, by her, the said Maude Aubian, as and for a note and mortgage for said principal sum of twenty-two hundred and fifty dollars, or whether she, the said Maude Aubian, made, signed, executed, acknowledged and delivered to him, the said Harvey Smails, at the date said purported note and mortgage bore, a note and mortgage for the principal sum of two hundred and fifty dollars, and no more, and whether said last-mentioned note and mortgage had been, after being so made, signed, executed, acknowledged and delivered, was without the knowledge or consent of her, the said Maude Aubian, materially altered so as to be and represent a note and mortgage for the principal sum of twenty-two hundred an fifty dollars, and whether the same, after being so altered, were or were not the aforesaid purported note and mortgage so sought to be adjudged and declared null and void, and by such adjudication and judicial declaration, to be so canceled, and thereupon he, the said Harvey Smails, then and there, on the said 12th day of January, 1910, appeared in this, the said superior court, at and during the said trial, as a witness in behalf of himself, the said Harvey Smails, and his said codefendant, and as such was sworn by the said court, in due form of law, that the evidence he should give in said cause and issue should be the truth, the whole truth and nothing but the truth, which said oath was duly administered to him, the said Harvey Smails by the Honorable Thomas H. Brents, the judge of said court, then and there presiding over said trial, the said court then and there having jurisdiction of said cause and the said court and judge then and there having lawful authority to administer said oath; and the said Harvey Smails then and there, as such witness in said court and cause, upon said trial, and upon his said oath, so administered as aforesaid, wilfully, corruptly, knowingly, falsely and contrary to his said oath, testified in said cause and issue, then and there on trial in and before said court as aforesaid, in substance and effect that said note was made, signed, executed and delivered to him, the said Harvey Smails, by the said Maude Aubian at his office in Seattle, on the day of its date, in its then present form, as and for a note for the principal sum of twenty-two hundred and fifty dollars; that said mortgage was, at said time and place, made, signed, executed, acknowledged and delivered to him, the said Harvey Smails, by her, the said Maude Aubian, in its then present form and

as and for a mortgage to secure the payment of said note as described by him, the said Harvey Smails, in his testimony aforesaid, for the said sum of twenty-two hundred and fifty dollars; that said Maude Aubian came to his said office at the time and requested him, the said Harvey Smails, to loan her, the said Maude Aubian, the said sum of twenty-two hundred and fifty dollars; that he, the said Harvey Smails, then and there in the presence of her, the said Maude Aubian, directed one Joseph F. Eades, who was then and there present in said office, to draw said note and mortgage for said sum; that the same were so drawn by the said Joseph Eades and signed by said Maude Aubian in their said form and for said sum, and not for and as a note and mortgage for the sum of two hundred and fifty dollars; that said testimony, and each and every part thereof, was, when so given by him, the said Harvey Smails, as aforesaid, material to said issue and wholly false; that, in truth and in fact, as he, the said Harvey Smails, then and there well knew, said note was not made, signed, executed or delivered to him, the said Harvey Smails, by the said Maude Aubian in its then present form, nor as for a note for the principal sum of twenty-two hundred and fifty dollars, or otherwise than as and for a note for the principal sum of two hundred and fifty dollars; that said mortgage was not made, signed, executed, acknowledged or delivered by her, the said Maude Aubian, to him, the said Harvey Smails, at the time and place so stated by him, the said Harvey Smails in his testimony aforesaid, as he, the said Harvey Smails, well knew when giving said testimony, in its then present form, nor as for a mortgage to secure the payment of said or any note for the said principal sum of twenty-two hundred and fifty dollars, or a note for any other or greater sum than two hundred and fifty dollars; that said Maude Aubian, as he, the said Harvey Smails, well knew when giving said testimony as aforesaid, did not at the time and place specified by him, the said Harvey Smails, in his said testimony, or at any other time or place request him, the said Harvey Smails, to loan her the said sum of twenty-two hundred and fifty dollars, or any other or greater sum than two hundred and fifty dollars; that as he, the said Harvey Smails, well knew when giving said testimony as aforesaid, he, the said Harvey Smails, did not at the time and place so specified by him in said testimony, direct said Joseph F. Eades to draw

said note and mortgage, or either of them, for said sum of twenty-two hundred and fifty dollars in the presence of her, the said Maude Aubian, and that said note and mortgage were not, nor was either of them, so drawn by said Joseph F. Eades and signed by her, the said Maude Aubian, in their or its form at the time of giving said testimony by him, the said Harvey Smails, or for said sum of twenty-two hundred and fifty dollars, or for any other or greater sum than two hundred and fifty dollars, as he, the said Harvey Smails, then and there well knew, and that he, the said Harvey Smails, then and there thereby committed the said crime of perjury, in the first degree, contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the state of Washington."

On being arraigned, the appellant entered a plea of not guilty to the information, and in due course a trial was had on the issue thus made, which resulted in his conviction and sentence to the state penitentiary. This appeal followed.

Taking up the assignments of error in the order in which the appellant presents them, the first to be noticed is the contention that the information does not state facts sufficient to constitute a crime. It is argued, that the information fails to show wherein the testimony alleged to have been given by the appellant in the civil action was false; that it does not clearly point out the material testimony upon which the state relies for a conviction; and that it does not set forth what portion of the testimony alleged to have been given was known by the appellant to be false. But we think the information sufficiently definite in these respects. It sets out the false testimony given at the trial of the civil action, and asserts its falsity not only by negation, but by setting out the true facts by way of antithesis. This is a sufficient negation of the truth of the testimony given, under all of the authorities. The claim that knowledge on the part of the appellant of the falsity of his testimony is not sufficiently alleged is equally without foundation. It will be observed, by a reference to the information, that the pleader not only charged the appellant with having "wilfully, corruptly, knowingly and falsely" tes-

tified to a certain state of facts, but he also charged him with knowledge of each particular fact alleged to negative the truth of the statement made by the witness. It would seem that the allegation could hardly have been made more definite.

On the trial the state sought to prove that the note and mortgage, which was the subject of controversy in the civil action in which the perjury was charged to have been committed, was given as a note and mortgage for the sum of two hundred and fifty dollars, and had been subsequently altered so as to make it appear to be a note and mortgage for two thousand two hundred and fifty dollars. To that end it called certain expert witnesses who were allowed to testify, over the objection of the appellant, that, in their opinion, the first figure "2" in in the number "2250" was written at a different time, and under different circumstances, from that under which the remainder of the figures were written, and that the word "Twenty," preceding the words "Two hundred and fifty," was written at a different time, and under different circumstances, from that under which the words "Two hundred and fifty" were written; also that, in the mortgage, the word "Twenty," in the two places where it precedes the words "Two hundred and fifty," was written at a different time, and under different circumstances, from that under which the other words were written. To this evidence the appellant makes two objections; first, that the witnesses themselves were not qualified to testify as to the matter; and second, that the subject-matter of the inquiry itself was not such as called for expert testimony.

As to the first objection, the witnesses offered were shown to be bankers and accountants of long standing, having an extended experience in dealing with commercial paper and securities of the character of that in question in this case, and that a part of their duties was to detect irregularities of the nature of those in question. There is no fixed criterion by which an expert can be determined. If he is shown to have peculiar skill and knowledge concerning the subject of the

inquiry, gained by observation, personal experience, or study, not possessed by men in the common walks of life, he is an expert upon that subject and is competent to give an opinion thereon. The witnesses in the case measure up to this test, and in our judgment, were competent to testify.

The contention that the evidence itself was inadmissible presents a question of more difficulty, yet we think the lower court correctly resolved it. The line of demarkation between matters that fall within the knowledge of mankind generally and matters that are the subject of special and peculiar knowledge cannot, from the nature of things, be very accurately drawn. The one, of necessity, shades into the other, and hence, even though the extremes of the opposing rules may be definitely marked and error predicated thereon easy of determination, the trial judge must have something of discretion whether he will or will not admit opinion evidence when the line of demarkation between these rules is approached. Now, it is the almost universal authority that a witness duly qualified may testify that in his opinion a given writing is or is not the writing of the person by whom it was purported to have been written, but is the writing of another; or, in other words, he may testify not only that a given writing is or is not a forgery, but that it was or was not forged by a particular person. It would seem, therefore, by analogy, that an expert witness might legally testify that, in his opinion, a part of a given writing, although concededly written by the person by whom it is purported to have been written, was written at a different time, under different circumstances, with a different pen, or with different ink, from that with which other parts of the same writing were written. Such matters are, to our minds at least, matters of special and peculiar knowledge, rather than knowledge common to mankind in general. While the authorities on the particular question are not entirely uniform, we think the greater weight is with the ruling of the trial judge. In 15 Am. & Eng. Ency. Law (2d ed.), 278 *et seq.*, the rule is stated as follows:

"It seems that an expert may testify as to any matter bearing upon the genuineness of a disputed writing regarding which an opinion can be formed from an inspection of the writing itself.

"Thus he may testify as to the characteristics of the handwriting in question; as to whether the writing is natural or feigned; as to alterations, additions, or erasures; as to whether the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time; as to whether two instruments or signatures were written with the same ink; as to whether an instrument was written with a pen; or as to the age of a writing."

In *Quinsigamond Bank v. Hobbs*, 11 Gray 250, it was held competent to permit an expert witness to testify whether the whole of a promissory note was written at the same time. So in *Glover v. Gentry*, 104 Ala. 222, 16 South. 38, the question was whether a promissory note had been altered from a note for eighty dollars to one for twelve hundred and eighty dollars by writing therein, subsequent to its execution, the words "Twelve hundred and" before the word "eighty," and it was held competent to permit experts to give it as their opinion that the words "Twelve hundred and" were written in a different ink, at a different time, and in a different hand, than was the word "eighty." In *Tally v. Cross*, 124 Ala. 567, 26 South. 912, it was held competent for an expert witness to testify that, in his opinion, two papers were written at the same time. In *Bridgman v. Corey's Estate*, 62 Vt. 1, 20 Atl. 273, it was held that one having skill and experience in the use of a compound microscope could testify that an examination of a disputed note through the microscope showed traces of pencil marks on the paper on which the note was written, and that the fibre of the paper had the appearance of having been broken or rubbed off before the ink was laid thereon, notwithstanding both the note and microscope were before the jury, and the matter testified to subject to their inspection. In *Vinton v. Peck*, 14 Mich. 287, one of the questions at issue was whether or not the note which was the subject-matter of

the action had been changed from a note of eight dollars to a note of eighty dollars by adding the letter "y" to the word "eight." One Clark was called as a witness and was permitted to testify that, in his opinion, the note had not been so altered, giving as his reason for the conclusion that the letter "y" could not have been added because of its relation to other letters. This was assigned as error, and the court, passing on the assignment, used the following language:

"This testimony was proper. The witness was engaged in a business which would be quite apt to familiarize him with all the ordinary appearances of writings, and the addition of a letter, after a document had been finished, is so generally adapted to give it a peculiar and recognizable appearance, that no great amount of experience would be necessary to detect it in ordinary cases. The value of a witness's belief must depend upon circumstances, but it is proper to go to the jury like other questions upon the genuineness of writings. It is very true that the jury may examine the paper for themselves, and that opinions are not usually admissible where the jury can form their own conclusions unaided. But we do not think it would be safe in this country to adopt a rule which assumes such a degree of knowledge and skill among jurors. Even reasonably expert writers may obtain valuable aid from opinions on such questions, and as neither law nor custom requires our juries to meet any standard of education, we think that to exclude such aid would lead to absurd results. The most enlightened courts have availed themselves of such assistance, and we deem it wise to use it in all cases where it is at hand."

See, also, *Dubois v. Baker*, 40 Barb. 556; *Ballentine v. White*, 77 Pa. St. 20; *Eisfield v. Dill*, 71 Iowa 442, 32 N. W. 420; *Cox v. Dill*, 85 Ind. 334; *Moye v. Herndon*, 30 Miss. 110; *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. 393.

In this state the precise questions seem not to have been decided, but we have held that an expert in handwriting may testify as to the genuineness of written instruments where he knows the handwriting of the person whose writing is in question, and also that it is competent for an expert to make comparison between the disputed signature and a genuine signa-

ture and give his opinion whether the disputed signature is genuine or not. *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142; *Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241. The cases on the other side, we shall not review. Those thought to bear upon the question will be found collected in the briefs of the appellant's learned counsel. Without further inquiry, therefore, we conclude that the court did not err in admitting the evidence of which complaint is made.

The third assignment of error is based upon the ruling of the trial court refusing to withdraw the case from the consideration of the jury. But in our opinion the testimony was ample to sustain the conviction. There was not, it is true, the direct testimony of two witnesses to the perjury, but there was the direct testimony of one witness, and corroborating circumstances established by independent evidence of such a character "as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence," if the jury believed the evidence. This was sufficient under the rule announced by us in *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123.

During the cross-examination of the appellant's witness Joseph F. Eades, the following occurred. By the prosecuting attorney:

"Q. At the time this mortgage was signed by Mrs. Aubian where did you find her? At the time the affidavit was signed? A. I was down to see a client of mine in the Miner Hospital, to see a client of mine, and while I was there Mrs. Aubian was there or she came after I was there, and I had this affidavit at this time and we went outside and I told her about it. She had asked me when she would get this matter settled up and get her money, and I told her then that as soon as this matter went back there she would get what was coming to her then. Q. Who was the client? A. Miss Mitchell. Q. Do you know where she is now? A. I do not know where she is now. Q. Have you seen her since the civil case here? A. Yes, sir. Q. Where? A. In Seattle. Q. She is a client of yours? A. Yes, sir. I supposed she would be here at this trial, and I am sorry she is not. Q. You are sorry she is not? A. Yes,

sir. Q. You heard her testimony in the court below? A. Part of it; I went to Portland when the case was going on. Q. You heard her testify that this note and mortgage was not drawn for the sum of —(Interrupted). Mr. Zent: I ask that the prosecuting attorney be reprimanded and that the jury be instructed to disregard what the attorney has said. The Court: I think the last question will be stricken out, and the jury instructed not to consider it as a part of the evidence in the case."

This is assigned as improper conduct on the part of the prosecuting attorney, and a reversal it asked because thereof. But we think there was nothing here on which to predicate reversible error. The cross-examination was proper enough down to the last question, and counsel's objection to that was promptly sustained, and the jury told not to consider it as part of the evidence in the case. It is to be presumed that the jurors, as sensible and intelligent men, obeyed the instruction of the court and disregarded the insinuation the question contained, rather than that they drew any unwarranted inferences therefrom. The cases cited by counsel in support of this claim of error, namely: *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 596, 15 Atl. 411; *Bullard v. Boston & M. R. R.*, 64 N. H. 27, 5 Atl. 838, 10 Am. St. 367, and *Turner v. Muskegon Machine & Foundry Co.*, 97 Mich. 166, 56 N. W. 356, are cases where an abuse of the privilege of cross-examination was carried to extreme lengths, yet it seems to us that in each of them the court, in finding grounds for reversal on the matter that is recited in the record, went to the verge of the rule.

In this same connection it is argued that the prosecutor's argument to the jury at the close of the case was so intemperate as to amount to misconduct, but we do not find that the objection to the address, if any were made in the court below, was preserved in the record. No error can be founded on improper argument of counsel to the jury where no motion is made to strike it, or the court asked to instruct the jury to disregard it. *State v. Regan*, 8 Wash. 506, 36 Pac. 472; *State*

v. Bailey, 31 Wash. 89, 71 Pac. 715; *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897; *State v. Wong Tung Hee*, 41 Wash. 623, 84 Pac. 596; *State v. Hawkins*, 27 Wash. 375, 67 Pac. 814; *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867.

J. C. Robinson was called as a witness for the defense, and being interrogated by the defendant's counsel, made answers, as follows:

"Q. I hand you Plaintiff's Identification 1, known as the 'mortgage,' I will ask you if you are the notary who signed that as a witness and acknowledged it? A. Yes, sir. Q. Did you notice that document at the time you signed it as a notary public? A. I did to a certain extent, yes, sir. Q. Are you able to state how much that mortgage was written for at that time? A. No, sir. Q. Do you know about how much it was? A. I could not swear to it. Q. Did you make any examination of the mortgage at that time? A. I usually make a pretty close scrutiny of every paper I sign. This has been a good while ago. Q. What do you say now as to whether that mortgage was written for two hundred and fifty dollars or twenty-two hundred and fifty dollars. A. I could not swear as to either, whether it was two hundred and fifty or twenty-two hundred and fifty. Q. You got no impression as to the amount of the mortgage from the examination you made? Mr. Smith. I object, he said he could not testify positively, it would be a mere guess. Objection sustained."

The refusal of the trial judge to permit an answer to the last question is assigned as error. But the ruling was proper. From the answers to the preceding questions it is plain that any answer the witness could have made to this would have thrown no light upon the question at issue.

A number of errors are assigned on the instructions given by the court, and the refusal to give certain others requested by the defendant. These it would be unprofitable to notice in detail. As a whole, the instructions fully and fairly state the law of the case to the jury, and cover all that is material in the requested instructions submitted by the defendant.

Counsel, however, argue one exception to the instructions

with much earnestness, and this we will briefly notice. The court in its charge first outlined to the jury the testimony alleged in the information to be false and perjured and to have been given by the defendant on the trial of the civil action between Maude Aubian and himself, and then instructed them that all the testimony imputed to the defendant was material to the inquiry the court was authorized and required to make in determining that action. Further on it outlined the several essential facts the jury must find in order to find the defendant guilty, the sixth of these being that the jury must find that the defendant, in the trial of the civil action, after being sworn, took the witness stand and gave the testimony imputed to him by the information, or gave "some substantial part of it." And during the remainder of the charge, in every place where the court had occasion to refer to the testimony given by the defendant as set forth in the information, it charged the jury to the effect that it was not necessary that they find that the defendant gave all the testimony imputed to him by the information, but that it was sufficient if they found that he gave some substantial part of the testimony so imputed to him. The defendant excepted to so much of the charge as stated that it was sufficient if the jury found that the defendant gave some substantial part of the testimony imputed to him in the information, but did not except to the sufficiency of the summary of the charge contained in the information made by the court, nor to the charge that all of the testimony imputed to the defendant in the information was material to the inquiry in the civil action.

It is argued that the portion of the charge excepted to is error, because it does not point out what part of the testimony the court deemed substantial, but allowed the jury to find the defendant guilty if they found that he testified to the immaterial matters which were imputed to him by the information. But as we say, the court charged that all of the testimony imputed to the defendant by the information

was material to the inquiry in the civil action. As this was not excepted to, it became the law of the case, and the appellant cannot now be heard to say that all of it was not material. This would be to mislead the trial judge and cause trials to be had in the trial court on one theory and in this court on another, a thing the law does not tolerate. The state did not have to prove all the matter imputed to the defendant precisely as it had alleged it. The substance of the allegations was all that was required to be proved. Hence, when all the matter alleged was material, it was proper to charge that the defendant could be convicted by proof of some substantial part of the matter alleged.

A motion for a new trial was filed in the court below, based upon a claim of misconduct of the regular judge of Walla Walla county. From the record it appears that the trial of the defendant was presided over by a judge called for that purpose from an adjoining county, and that the regular judge was subpoenaed by the state as a witness on its behalf. The charge is that he intermingled with the other witnesses on behalf of the state, and manifested such a friendly regard and interest in their welfare as to give them a character and standing before the jury that they otherwise would not have had and which they did not deserve. The matter seems to have been suggested to the presiding judge for the first time after verdict, by affidavits filed with the motion for a new trial. It is our opinion that the objection was made too late to avail the defendant, even conceding the objection to be of merit. The remedy for misconduct on the part of any one during the progress of a trial is to call the attention of the presiding judge to the alleged misconduct and move by some proper procedure to have the matter corrected. It is not timely to await the result of the trial and then complain only in the case of an adverse verdict. Nor does it matter that the guilty party may be the regular judge of the court in which the trial was being had. When merely attending the court as a witness such judge is subject to all the penalties

of an ordinary witness. Whether, therefore, the alleged misconduct was sufficient to warrant the granting of a new trial we shall not inquire, as we think the question not properly in the record.

Since the appeal of this cause, and while the case was in this court, a second motion for a new trial was presented to the court below, overruled by that court, and certified to this court. The motion is based on an affidavit obtained from the prosecuting witness subsequent to the taking of this appeal. This motion is likewise untimely and cannot be considered here.

The judgment is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

[No. 8961. Department Two. April 18, 1911.]

SCANDINAVIAN AMERICAN BANK, *Appellant*, v. E. W. JOHNSTON, *Respondent*.[1]

BILLS AND NOTES—BONA FIDE PURCHASER—HOLDER IN DUE COURSE—GOOD FAITH—BURDEN OF PROOF—STATUTES—CONSTRUCTION. The negotiable instruments act, Rem. & Bal. Code, § 3443, providing that a holder in due course is one who takes in good faith for value, and § 3450, providing that, if the title of one who negotiates a note is defective, the burden is upon the holder to prove that he is a holder in due course, must be construed in connection with § 3447, which provides that to constitute notice of an infirmity or defect in title, there must be actual knowledge thereof or of such facts that the taking of the note amounts to bad faith; hence, where the holder has established by undisputed evidence that it is a holder in due course without actual notice, the burden then devolves upon the maker to show that the holder was guilty of some act, neglect or inexcusable omission amounting to *mala fides* on its part sufficient to show dishonest dealing preventing it from being a holder in due course; negligence or the omission of precautions or the mere suspicion of an infirmity not being sufficient to constitute bad faith or to put upon inquiry.

[1]Reported in 115 Pac. 102.

SAME—EVIDENCE—SUFFICIENCY. Where the title to a note was defective by reason of fraud not discovered until after it was negotiated to a bank, and the bank established, by the undisputed evidence of disinterested witnesses, that it took the same before maturity for full value in good faith, it is entitled to a directed verdict as a holder in due course; and it is not evidence of bad faith or sufficient to put the bank on inquiry, and prevent a directed verdict, that the maker had previously negotiated to the same bank the notes of another person the title to which was claimed to be defective, where the prior transaction was closed and settled three months before the other note was in existence, and bore no relation to it, there was no occasion to prosecute any inquiry on the prior occasion, and inquiry would have disclosed nothing as to the note and transaction in question.

DUNBAR, C. J., dissents.

Appeal from a judgment of the superior court for King county, Neal, J., entered January 29, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Reversed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Hart, Prigmore & Evans, for respondent.

CROW, J.—Action by Scandinavian American Bank against E. W. Johnston, on a promissory note. From a judgment against it, the plaintiff has appealed.

The controlling assignment is that the trial judge erred in refusing to withdraw the case from the jury, and enter judgment in appellant's favor. The following facts appear from undisputed evidence: Some time in January, 1909, the respondent, E. W. Johnston, subscribed for $5,000 par value of the capital stock of the Electric Transportation Company, a corporation organized to operate a line of sightseeing automobiles on the streets of Seattle and motor boats on Lake Union, during the A.-Y.-P. Exposition. In part payment, respondent executed his note for $2,000 to the transportation company, which, being sold to a *bona fide* holder for value, was paid at maturity. On May 7, 1909, certain supplies consigned to the transportation company had reached Seattle,

upon which a large amount of freight and other charges was due. The Electric Transportation Company was a customer of the appellant bank where it then had on deposit a balance of about $2,000, but it needed $5,000 more to meet the freight and other charges. It then applied for a loan of $5,000; whereupon appellant refused to accept its note without security, but agreed to make the loan on its note indorsed by five or six wealthy business men of Seattle, its stockholders, of whom respondent was one. A $5,000 note of the transportation company, dated May 7, 1909, running to the bank as payee, due in ninety days, indorsed by several of the transportation company stockholders, was executed. Respondent refused to indorse this note, but on the same day did execute his $3,000 note to the transportation company, also due in ninety days, which he then and there delivered to it in payment of the remainder of his stock subscription. He testified that he then told the payee he did not want it to be sold or negotiated. This statement, although denied by other stockholders, we accept as true.

On the same day, May 7, 1909, the transportation company delivered to the bank the principal note for $5,000, indorsed by a portion of its stockholders, and as further and collateral security therefor, at the same time and as a part of the same transaction, also delivered to it respondent's $3,000 note, and two other notes of $1,000 each, previously executed and delivered to the transportation company by one Appleton in payment of his stock subscription. The bank accepted the principal and collateral notes, made the loan, and immediately placed $5,000 to the credit of the transportation company, which on the same day checked it out in payment of the freight and other charges. The transportation company passed into the hands of a receiver some time in the latter part of June, 1909. None of the notes have been paid, and the appellant bank commenced this action against the respondent, Johnston, on the $3,000 collateral note executed by him, and also another action against Appleton on the two

notes executed by him. We, on this date, file a separate opinion in the *Appleton* case, which is also in this court on appeal. *Scandinavian American Bank v. Appleton, post* p. 203, 115 Pac. 109.

The respondent, Johnston, in his answer, admitted the execution of his note, but alleged that his subscription to the capital stock had been procured by misrepresentation and fraud; that his $3,000 note, thereafter given in payment of such subscription, originated in fraud; that it was without consideration; that the appellant bank took it with knowledge of the facts constituting such fraud; and that it was not a *bona fide* holder. The jury, by their verdict in respondent's favor, necessarily found that the stock subscription, the consideration for the note, was obtained by fraud, and the only question we will consider is whether the appellant was entitled to a directed verdict upon the theory that it was a *bona fide* holder for value, having purchased the note before its maturity in due course.

The following facts indisputably appear from the evidence, and as we understand, are not challenged by respondent: That respondent executed and delivered his note to the transportation company in payment of his stock subscription; that it was on the same day delivered as collateral security to the bank, which then and there made a loan of $5,000 in cash to the transportation company on the principal note; that the bank at that time had no knowledge of any misrepresentations made to Johnston, or that his note had been fraudulently procured without consideration; that Johnston himself did not then know he had been defrauded, and that he did not learn the actual facts until the appointment of the receiver.

The jury, by its verdict, must have found the appellant was not a holder in good faith, and the only possible circumstance upon which it could have predicated such a finding was that about January 25, 1909, one C. H. Lilly, a prominent and wealthy business man of Seattle, also subscribed for capital stock of the transportation company, and in part

payment therefor executed and delivered to it his five promissory notes of $1,000 each; that two of these notes were forthwith sold to the appellant bank at par for value, it then becoming an unquestionable holder of them in due course and good faith; that about February 1, 1909, Lilly, claiming his notes had been procured by the misrepresentations of an employee of the transportation company, engaged to sell its stock, surrendered his stock to the company, and demanded a return of his notes, none of which had yet matured; that three were returned to him, but that he was advised by the company the other two had been sold to the bank. He then called upon the bank, and all notice or knowledge it obtained from him is shown by his testimony, which we accept as true, and which he gave as follows.

"(Examination in chief.) Q. Did you see Mr. Lane, the cashier of the Scandinavian American Bank? A. I did. Q. What did you tell him about those notes? A. I told Mr. Lane I wished to find out if they were holding certain notes of mine, and, if they were holding them, I wanted to arrange to have the Electric Transportation Co. take them up; that they had agreed not to cash them, and, inasmuch as they had an account there, as I understood, and plenty of money, I wanted to arrange it so I could get my notes back. Q. What did you tell him, if anything, about the company having secured them from you by misrepresentation? A. I told Mr. Lane they had misrepresented the facts to me to get those notes; and he stated he could not very well arrange to get the notes back, because they did not have a very large balance there; and he stated that they bought this note on the strength of my name being there and being perfectly good, but he did not know the facts about the purchase, and Mr. Woolfolk, I think, he referred me to as knowing the particulars of the purchase; I think, however, that Mr. Lane told me that Mr. Chilberg had passed on them. Someone else—he hadn't passed on it—as I remember—on the purchase of the note. Q. Now, when was it you were in the bank and made the protest about the notes and had the conversation with Mr. Lane? A. Well, it was somewhere about—well, four or five days after the dates on them. Q. You think it was four or five days after the dates on them? A. Yes, sir.

Q. That would be in the vicinity of February 1st, 1909? A. February 1st; and I think this note was due February 9th. (Cross-Examination) Q. So you told Mr. Lane they had misrepresented the matter to you by agreeing that they would not negotiate your notes? A. I told them they had misrepresented matters to me and also had agreed not to negotiate my paper; and he said they had already purchased these two notes; and he sent me back to talk to Mr. Woolfolk, and I actually saw the notes in their possession there in the hands of the man at the note counter—I forget that gentleman's name. . . . A. I went to see Mr. Lane to use a little personal influence and get him to help me get my notes, and if they had a fat bank account there I thought he could easily arrange it."

It further appears that, shortly thereafter, Lilly, without participation of the bank, effected some satisfactory arrangement with the transportation company, in pursuance of which it agreed to pay, and did pay, the two notes when they became due, and returned them to him. The only possible notice the bank had that these payments were made by the transportation company must be predicated upon the fact that one of them was paid by the company check drawn upon the appellant bank. It is apparent that appellant has many employees and transacts an extensive banking business. Nothing further occurred between Lilly and the bank. Both of the Lilly notes were paid before the collateral $3,000 note was executed by the respondent, Johnston. The sole question before us is whether any such notice of the Lilly transaction came to the bank as to demand an inquiry in regard to the origin of respondent's note, and whether the bank has been guilty of any such neglect in failing to prosecute an inquiry as will deprive it of the position and rights of a *bona fide* holder of the collateral note. Although the cashier and other employees of the bank denied Lilly's statements, we, as above stated, accept them as true.

Respondent, citing § 3443, Rem. & Bal. Code, defining a holder in due course; § 3446 defining defective title; § 3447, defining notice of defective title, and § 3450, relating to de-

fenses against the claim of a holder in due course; and also citing *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801, and other cases upon which he relies, contends that the question whether the appellant was a *bona fide* holder in due course was for the exclusive consideration of the jury; that the cashier was an interested witness; and that his credibility was also for the jury. There is no question but that, upon an issue of fact, conflicting evidence must be submitted to the jury for its consideration. Nor can it be disputed that the credibility of the bank cashier, an interested witness, would be for the jury were his evidence unsupported, improbable, and necessary to sustain a finding of *bona fides*. In this case the cashier's evidence could be entirely eliminated and yet, under our interpretation of the law, it would appear indisputably from the evidence before us that the bank was in fact a *bona fide* holder for value in due course. In the *Scharpenberg* case the only evidence relied upon to show the title and good faith of the plaintiffs as endorsees was oral testimony of themselves, given without the corroboration of records of their business or other circumstances. Speaking of their statements, we said:

"There was no evidence as to the manner, consideration, or time of purchase of the note by the respondents, save that given by themselves. Frank N. Ireland testified as to the amount paid for the note, and that it was purchased of Robert Burgess & Son, August 1, 1907, without any notice of there being any defense thereto. It will be noticed that this was after interest was some three months in default, but before maturity of the first installment. Charles Ireland testified to substantially the same effect, but he admitted upon cross-examination that the knowledge he had in this respect was gained from their records, and it was from them he was testifying. No record was produced, so we have no competent evidence of the purchase, or time of purchase, of this note save that of Frank N. Ireland, who, of course, is a witness directly interested in the result of the cause. His testimony in this regard was not contradicted by any direct evidence. There was, however, the circumstance of the interest being in

default some three months, as well as other minor circumstances which the jury would have been warranted in taking into consideration in weighing the testimony of Frank N. Ireland, even though not directly contradicted, had the cause been submitted to them. In other words, the jury would not have been required to take the testimony of Frank N. Ireland in this regard as conclusive proof, *and there was no other upon that question.*"

In this case there is no dispute as to the time the bank acquired the note, the consideration paid, nor of any other fact tending to show that it became a holder before maturity and for value. The only question is its *bona fides* or *mala fides*, in acquiring title. Our holding in the *Scharpenberg* case, that the question of the *bona fides* of the plaintiffs and their credibility was for the jury, was predicated upon the evidence then before the jury and mentioned in the opinion. In making our conclusion, we cited *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676, and other authorities which follow that case. In the New York case, the conduct of the cashier was shown to be such as to indicate a deliberate intention upon his part to studiously avoid knowledge, which he manifestly anticipated would disclose the defective title of the payee. The facts are stated in the opinion. This New York case has, on similar evidence, been repeatedly followed by this and other courts, but the court of appeals of New York itself distinguished it in *American Exchange Nat. Bank v. New York Belting & Packing Co.*, 148 N. Y. 698, 43 N. E. 168, a case similar to this, in which it held that judgment should be directed against a maker in favor of a plaintiff endorsee as a *bona fide* holder in due course. In the *Canajoharie Bank* case, the court said:

"The payment of value for negotiable paper is a circumstance to be taken into account with other facts, in determining the question of the *bona fides* of the transaction, and when full value is paid, is entitled to great weight. But that fact is never conclusive, *except in the absence of evidence tending to show notice or bad faith.*"

Although subd. 3 of § 3443, Rem. & Bal. Code, in defining a holder in due course, provides that he shall have taken the instrument in good faith, and § 3450 provides, when it is shown that the title of the person who has negotiated the instrument is defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as holder in due course; and although under § 3446 the title of the transportation company to this instrument must be regarded as defective, these sections, being each and all in our negotiable instruments act, must be considered in connection with § 3447, Rem. & Bal. Code, of the same act, which reads as follows:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In other words, if an endorsee for value before maturity did not have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, he would, so far as that question is concerned, be held a holder in good faith, no *mala fides* being shown. In *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. 1042, commenting on this section and quoting with approval from Crawford's Annotated Negotiable Instruments Law, we said:

"The respondent purchased the note for value before maturity, and at the time of his purchase had no notice of any defect or infirmity in the instrument. The chief circumstance upon which the appellant relies to establish *mala fides* is the fact that the respondent knew that Behan was an insurance agent, and that the note was given in whole or in part in payment for an insurance premium. The rule by which the good faith of a holder of negotiable paper is to be determined is thus stated in Crawford's Annotated Negotiable Instruments Law (3d ed.), p. 68: 'The holder is not bound at his peril to be on the alert for circumstances which might pos-

sibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fides*, his title, according to settled doctrines, will prevail.' This rule is fully supported by the authorities, and, measured by it, the title and good faith of the respondent were not impeached."

In *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903, on issues of fact similar to those now before us, we sustained the action of the trial judge in withdrawing the case from the jury at the close of all the evidence, and directing a judgment for the plaintiff. In our opinion, citing and commenting on §§ 56 and 57 of the negotiable instruments act, Laws 1899, p. 350 (Rem. & Bal. Code, §§ 3447, 3448), we said:

"But, notwithstanding this act positively provides that, to constitute notice of an infirmity in a negotiable instrument, the purchaser must have knowledge of such facts that his action in taking the instrument amounted to bad faith, we cannot think that the legislature meant to say that a purchaser of a negotiable instrument can shut his eyes to the surrounding circumstances, remain in willful ignorance of facts which would have made known to him the infirmities of the instrument he purchases, and then claim, because he had no actual knowledge of such infirmities, that his title thereto is unimpeachable; but that it is still the rule that willful ignorance and guilty knowledge alike involve the result of bad faith. This, however, does not mean that the holder's title is to be overthrown by slight circumstances. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the inputation of bad faith. His rights are to be determined by the simple test of honesty and good faith, not by a speculative inquiry into diligence or

negligence. Although he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title will prevail."

In *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165, we held that fraud in the inception of a negotiable instrument will not invalidate it in the hands of an innocent holder in due course. The question arises, What knowledge did the appellant have of any infirmity in the title of the transportation company to the respondent's $3,000 note? We do not understand any claim is made that it had actual notice. The respondent himself testified as follows:

"Q. Captain Johnston, I understood you to say that at the time you signed this $3,000 note on May 7, 1909, that you had no knowledge of any fraudulent transactions upon the part of the company? A. No, sir; I did not. Q. Now, will you kindly tell the jury then, Captain, as near as you can, the date when you first discovered any fraudulent transactions? A. Why, I cannot tell; it was some time, I think, in there; some time in June, or the latter part of May, that Mr. Zintheo came to my house and wanted me to buy some more stock. Q. So that you had no information or notice that these fraudulent schemes were made until after that time—in June—early in June or late in May? A. No, sir; I don't think that I did."

If respondent was ignorant of the alleged misrepresentations and fraud, which he now claims vitiated the title of the transportation company, and his ignorance continued until after appellant had acquired the note, how could the appellant be presumed to have obtained actual knowledge as to the origin of this particular note before obtaining title? There is not a syllable of evidence that appellant did. Lilly's statement, as disclosed by his evidence, did not give the bank notice or knowledge of such facts as to show its bad faith in taking the note. It is conceded that the bank had in good faith, without notice, in due course and for value, purchased the Lilly notes before his interview with the bank. The bank

then had good title to the Lilly notes. There was no occasion demanding an investigation of those notes, nor an investigation of his dealings with the transportation company. Assuming that the bank had then prosecuted an investigation, it could have learned nothing questionable in the dealings between Johnston and the transportation company. The Johnston note was not then in existence, nor was it executed for more than three months thereafter. The Lilly notes were paid before respondent's note was executed. So far as the bank was concerned, the Lilly matter was a closed incident, satisfactorily closed, and calling for no further consideration. The transportation company and Lilly had settled their differences. The Lilly transaction had no relation whatever to respondent's note, executed three months later. Were it conceded to have been a circumstance sufficient to excite some suspicion as to the character of the dealings and acts of the transportation company, we could not, under the weight of modern authority, hold the appellant to have acted in bad faith, or that it was negligent in making no further investigation than it did. In other words, there is not, in the entire record, any suggestion of *mala fides* on appellant's part.

Some contention is made by respondent to the effect that, at the time appellant made the $5,000 loan to the transportation company, it knew the company was insolvent. This contention is based upon the admitted fact that a written statement was made to the bank by the transportation company, showing that its liabilities, some of them not due, exactly equalled its claimed assets, but in which no statement relative to its capital stock appeared. The transportation company was then, and for some time had been, a going concern, transacting business and carrying a substantial depositor's account with appellant. The bank does not contend that it made the loan on the credit of the company. On the contrary, it admits that it refused to do so. The loan was made on the credit of the endorsers of the $5,000 note and the col-

lateral security, including respondent's note. There was nothing suspicious in the fact that the bank made the loan to a going corporation on good security. It was immaterial, as affecting the honesty and good faith of the bank, whether the transportation company was worth anything, so long as its stockholders, most of them men of large wealth—a fact known to the bank—were willing to endorse for it, or had given it their notes which it could and did use as collateral. The loan, from the standpoint of the bank, was gilt-edged, and free from any suspicious circumstance. If the transportation company was then actually insolvent, its stockholders, including respondent, were in a better position than appellant to know or learn that fact, but they endorsed its paper, gave it their personal notes, and permitted it to continue the transaction of its business, at the time knowing it was procuring this identical loan of $5,000 from appellant to raise funds for use in its business.

In *Bothwell v. Corum*, 135 Ky. 766, 123 S. W. 291, the court of appeals, considering a section identical with § 3447, Rem. & Bal. Code, *supra*, in a case similar to this, held on the evidence offered, the trial court erred in refusing to peremptorily instruct the jury to find for the plaintiff. The court said:

"To constitute notice of an infirmity in an instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amount to bad faith. Ky. St. Sec. 3720b, sub-sec. 56. The proof in this case fails to come up to either one of these requirements of the statute. There is nothing in the case to show that appellant had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instruments amounted to bad faith. On the contrary, his evidence, which is unimpeached by that of any other witness or by any circumstances in the case, tends to show that he acquired the drafts before maturity, for value, and without notice of any infirmity therein or defect in the title of the American Jobbing Association, which indorsed, delivered, and sold the drafts to him."

It is well established by the overwhelming weight of modern authority that, if in an action on a negotiable note prosecuted by an endorsee, the maker alleges and shows the instrument to have been fraudulently obtained by the payee, it will then devolve upon the indorsee to show that he is a *bona fide* holder for value, and that he obtained the note before maturity in due course, and without knowledge of the infirmity, or of facts sufficient to put him on inquiry. But it is equally well established that mere suspicion of an infirmity is insufficient to put the endorsee upon inquiry, or show that he is not a holder in good faith. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903; *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. 1042; *Sinkler v. Siljan*, 136 Cal. 356, 68 Pac. 1024; *Valley Sav. Bank of Middletown v. Mercer*, 97 Md. 458, 55 Atl. 435; *Wilson v. Riddler*, 92 Mo. App. 335; *Bank of Sampson v. Hatcher*, 151 N. C. 359, 66 S. E. 308, 134 Am. St. 989; *Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.*, 122 Tenn. 415, 123 S. W. 641; *First Nat. Bank v. Moore*, 148 Fed. 953; *Reilly v. McKinnon*, 159 Fed. 78; *Hamilton Nat. Bank v. Upton*, 100 App. Div. 105, 91 N. Y. Supp. 475; *Second Nat. Bank v. Weston*, 172 N. Y. 250, 64 N. E. 949; *Kavanagh v. Bank of America*, 239 Ill. 404, 88 N. E. 171; *Fidler v. Paxton*, 101 Ill. App. 107; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316.

In *Sinkler v. Siljan*, *supra*, the supreme court of California said:

"To say that one who purchases a note before maturity and pays full value thereof, as plaintiff did in this case, must be prepared to defend his purchase against all equities and defenses the maker might urge against the payee, if in the purchase 'the circumstances were such as to invite inquiry on the part of the purchaser,' is too broad a statement of the rule, and gives to the jury too uncertain and indefinite a guide. The rule in such cases as this is quite fully considered in *Eames v. Crosier*, 101 Cal. 260. It was there held that where fraud or illegality in the inception of the note is shown the burden is cast upon the indorsee to show that he is an innocent holder, and this he may do by showing that he pur-

chased the note before maturity, or from an innocent indorsee for value, in the usual course of business. 'When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances *creating the presumption that he knew the facts impeaching its validity*, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities.' There is a marked difference, as we conceive, between circumstances 'such as to invite inquiry' and circumstances 'creating the presumption' that plaintiff knew the facts impeaching the validity of the note. It was said in *Collins v. Gilbert*, 94 U. S. 753, that to defeat the rights of a *bona fide* holder for value of a promissory note, claimed to have been procured by fraud, it must be shown, either directly or by circumstances, that he had notice of such infirmity. 'Proof of such facts and circumstances as would have put a reasonable man upon inquiry in relation thereto are not sufficient to constitute a defense to a suit by the holder.' "

The case of *Reilly v. McKinnon, supra*, is quite similar to this, it being there contended by the makers that their notes given in payment of stock subscriptions had been frequently obtained by the payee, and that the indorsee was not a holder in good faith. The court held a judgment should have been directed for the indorsee, and in discussing the evidence, said:

"But, as already stated, whatever the character of the company may have been, there is no evidence of a fraudulent conspiracy or any evidence to show that the plaintiff took the notes in question with knowledge of the alleged fraudulent representations, or with such notice of the facts and circumstances attending their execution that his acceptance of them must be deemed to have been done in actual bad faith. He was ignorant of the entire transaction. One may be a *bona fide* holder of commercial paper and entitled to protection as such, notwithstanding he had knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even though he were grossly negligent at the time of the transfer; the test is, did he act in bad faith? This is generally accepted law, . . ."

In *Kavanagh v. Bank of America, supra,* the second syllabus reads as follows:

"Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without knowledge of any defenses thereto; and mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even negligence of the endorsee in acquiring the paper, will not defeat his title."

In nearly all, if not all, of the cases above cited it was held that the plaintiff endorsee, upon the evidence, was entitled to a directed judgment or verdict in his or its favor as a *bona fide* holder. There is nothing in this case showing any bad faith or *mala fides* on appellant's part. Although it is true that, when the title of the transportation company was shown to be defective, the burden devolved upon the appellant to show it was a *bona fide* holder, yet after it had introduced evidence not in any manner contradicted or disputed, showing it to be such a holder, and completely disclosing all the circumstances surrounding the acquisition of its title, and when it appeard from its records, the records of the transportation company, and evidence of disinterested witnesses, that it had paid value for the note, and no circumstance suggesting *mala fides* on its part was disclosed by the evidence thus produced, it then devolved upon the respondent to show that the appellant was guilty of some neglect, wrongful act, or inexcusable omission, which amounted to *mala fides* on its part, sufficient to show its dishonest dealing and prevent it from being held a *bona fide* holder in due course. *Sinkler v. Siljan, supra.* If the evidence in this case indicated, as it did in *Ireland v. Scharpenberg* and *Canajoharie National Bank v. Diefendorf, supra,* that the appellant, when taking the respondent's note as collateral security, refrained from making any inquiry into its origin lest it might by means of such inquiry become acquainted with some fraudulent transaction out of which the note originated, sufficient to make the note defective, a different question would be presented. But no such evidence

appears. There was no suggestion of anything suspicious relative to respondent's note, nor any facts known to appellant at the time sufficient to put it upon inquiry. From the undisputed evidence before us, it appears that appellant was a *bona fide* holder for value in due course before maturity, and that a judgment should have been directed in its favor.

Reversed and remanded, with instructions to enter a judgment in appellant's favor.

CHADWICK and MORRIS, JJ., concur.

DUNBAR, C. J., dissents.

[No. 9228. Department Two. April 18, 1911.]

SCANDINAVIAN AMERICAN BANK, *Appellant*, v. JOHN F. APPLETON, *Respondent*.[1]

BILLS AND NOTES—BONA FIDE PURCHASER—HOLDER IN DUE COURSE—EVIDENCE—SUFFICIENCY. Where the title to a note was defective by reason of fraud not discovered until after it was negotiated to a bank, and the bank established, by the undisputed evidence of disinterested witnesses, that it took the same before maturity for full value in good faith, it is entitled to a directed verdict as a holder in due course; and it is not evidence of bad faith, or sufficient to put the bank on inquiry, and prevent a directed verdict, that the maker had previously negotiated to the same bank the notes of another person the title to which was claimed to be defective, where the prior transaction was closed and settled three months before the note in question was negotiated to the bank, and bore no relation to it, and there was no occasion to prosecute any inquiry on the prior transaction.

PLEDGES—NOTE AS COLLATERAL—RIGHT OF PLEDGEE—CORPORATIONS—STOCKHOLDERS—SURETIES ON PRINCIPAL NOTE. Where a stockholder's notes for his stock subscription were negotiated by the corporation as collateral security for its own note, which was indorsed by other stockholders who had paid their stock subscription, the holder in due course of the principal and collateral notes may enforce the collateral, although it was fraudulently obtained, without first proceeding to collect the principal note, where the corporation

[1]Reported in 115 Pac. 109.

had gone into the hands of a receiver and was not shown to be solvent, and the indorsers financially responsible on the principal note were only sureties for the corporation.

Dunbar, C. J., dissents.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 18, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on promissory notes. Reversed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Douglas, Lane & Douglas, for respondent.

Crow, J.—Action by the Scandinavian American Bank against John F. Appleton, on two promissory notes. From a judgment against it, the plaintiff has appealed.

The notes of the respondent, for $1,000 each, dated January 23, 1909, due in four and five months, were executed and delivered to the Electric Transportation Company, in payment of a stock subscription. On May 7, 1909, they were assigned to appellant as collateral security for the $5,000 note of the transportation company. The transaction in which these notes were thus assigned is the one mentioned in our opinion in *Scandinavian American Bank v. Johnston*, *ante* p. 187, 115 Pac. 102. That opinion fully discloses the facts. About the only difference between respondent's position and that of Johnston is that respondent's notes, pledged as collateral, were executed in the preceding January. This cause having been tried without a jury, is now before us for trial *de novo*. Without repeating the facts which appear in the *Johnston* case, we will simply state that, upon the evidence now before us, substantially the same as in the *Johnston* case, we cannot approve the finding of the trial judge that the appellant bank was not a *bona fide* holder of respondent's notes for value in due course.

Respondent, in this action, contends, that the principal $5,000 note was collectible; that his collateral notes were

fraudulently obtained; and that the bank should be compelled to first proceed against the principal note. In support of this position, respondent cites, *Prentice & Weissinger v. Zane*, 2 Gratt. (Va.) 262; *Hulett v. Marine Sav. Bank*, 143 Mich. 219, 106 N. W. 879, 4 L. R. A. (N. S.) 1042, and *Citizens' Bank v. Bank of Waddy*, 126 Ky. 169, 103 S. W. 249, 128 Am. St. 282, 11 L. R. A. (N. S.) 589. The evidence in this action discloses the fact that the endorsers on the principal note, shown to be financially responsible, had subscribed and paid for their stock in the transportation company, and that the appellant, Appleton, to the extent of $2,000, and Johnston to the extent of $3,000, had not paid their stock subscription except by giving their notes. If they could now be released from liability thereon, they would be relieved from paying for their stock, and the endorsing stockholders, who have already paid their subscriptions in full would, in addition thereto, have to pay the principal note. Whether this circumstance had any controlling influence over the bank in making its election to first proceed on the collateral notes does not appear. The evidence does show that the only responsible parties on the principal note are the endorsing stockholders, and not the transportation company, which, as maker, is primarily liable.

None of the cases cited by respondent sustains his contention that the bank should be required to first proceed against the endorsers. *Prentice & Weissinger v. Zane*, *supra*, in no respect touches the question. In *Hulett v. Marine Sav. Bank*, *supra*, there was sufficient evidence to sustain a finding that the endorsee, who held the defendant's note as collateral, was not a holder in good faith. The maker of the principal note was also shown and conceded to be financially responsible and able to pay. The maker of the principal note in this case is now in the hands of a receiver and not shown to be solvent. In *Citizens' Bank v. Bank of Waddy*, *supra*, one Paxton had delivered to the Bank of Waddy his renewal note, without at the time obtaining a surrender of his orig-

inal note, which had theretofore been assigned as collateral security. Instead of procuring and returning his original note, the cashier of the Bank of Waddy fraudulently assigned the renewal note to another bank as collateral. It was held that, if necessary to the collection of the principal indebtedness, for which his two notes had been assigned as collateral, the maker, Paxton, would be obliged to pay his original and also his renewal note, although given for but one debt. But it was further held that, for Paxton's protection, the endorsees would first be required to look to their other collateral, and that, if their principal notes could be thus satisfied, one of Paxton's notes should be surrendered to him. There was no question as to the liability of the makers of any of the other notes which constituted the remaining collateral. No such circumstances appear in this action. The only principal obligation, to which the rule for which appellant contends could be applied, if applied at all, is the debt of the transportation company. It could not be applied to the endorsers. Respondent's notes were properly endorsed by the transportation company, and before their maturity delivered to appellant, who then became a holder in good faith for value and in due course.

Reversed and remanded, with instructions to enter judgment in favor of the appellant.

CHADWICK and MORRIS, JJ., concur.

DUNBAR, C. J., dissents.

[No. 9087. Department Two. April 19, 1911.]

FRANK BEATTY, *Appellant*, v. METROPOLITAN BUILDING COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURY TO THIRD PERSONS—ACTS WITHIN SCOPE OF EMPLOYMENT. Where the owner of an uncompleted office building employed an elevator boy to run an elevator for the use of tenants while the contractors were installing other elevators and completing the building, the elevator boy's promise to an employee of the contractor not to run the elevator below the second story while the workman was necessarily in the shaft is within the scope of his employment, and does not render him the servant of the promisee; and the owner is liable for his negligence in so doing.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 31, 1910, upon granting a nonsuit, dismissing an action for personal injuries. Reversed.

Owens & Finck and *Reynolds, Ballinger & Hutson*, for appellant.

Kerr & McCord, for respondent.

CROW, J.—Action by Frank Beatty against Metropolitan Building Company, a corporation, to recover damages for personal injuries. At the close of plaintiff's evidence, the trial judge sustained defendant's motion for a nonsuit and dismissed the action. The plaintiff has appealed.

The evidence produced by appellant, which on a motion for nonsuit must be accepted as true, was sufficient to show the following facts: The respondent owned an uncompleted office building in the city of Seattle. The upper floors being completed, were rented by respondent to tenants who occupied the same. The building when fully completed was to be equipped with four passenger elevators. For this purpose an elevator shaft, divided into four compartments, one for each car, was provided. One completed elevator was installed in the south compartment, and on October 18, 1908, the date

[1]Reported in 115 Pac. 90.

of the accident, was being used for carrying passengers to and from the upper floors. An employee of respondent was in charge of and operated this particular car as the elevator boy.

In the compartment immediately north of and adjoining this south compartment, a new car was being installed, and appellant, a servant of the contractor who was completing the building, was employed to adjust an iron plate thereto. In performing this work it became necessary for appellant to enter at the first floor, the south compartment, in which the completed elevator was running, and remain there about ten or fifteen minutes. Thereupon appellant requested the elevator boy not to descend below the second floor until appellant's work had been completed, telling him it would be necessary for appellant to occupy the shaft at the first floor about ten or fifteen minutes. The elevator boy assented to this arrangement, and agreed not to descend below the second floor until notified by appellant. He then ran the car to the upper floor, leaving the door of the south compartment open on the first floor, so that appellant might gain admission. Appellant thereupon entered the south shaft and proceeded with his work. After he had been thus employed about a minute or two, the elevator, without warning, descended to the first floor, and seriously injured him. The completed car was in good order, and could be readily stopped within a distance of two or three feet, by the use of a controller or handle in charge of the operator.

Appellant contends that the elevator boy, by his negligence and while acting within the scope of his employment, inflicted the injuries of which he now complains. Respondent insists that the nonsuit was properly granted, contending (1) that, when the elevator boy, upon appellant's request, promised to operate the car to the upper floors and not to descend below the second floor, he went outside the scope of his employment in making such agreement; and (2) that in making such arrangement the appellant made the elevator boy his servant

for that particular purpose, and in so doing was guilty of contributory negligence. In support of its position, the respondent cites a number of authorities, but seems to place especial reliance upon *Jossaers v. Walker*, 43 N. Y. Supp. 891, and *Hall v. Poole*, 94 Md. 171, 50 Atl. 703. It must be conceded that these cases, to a very considerable degree, support appellant's contention. In each of them it was held that the operator of the elevator in effecting an arrangement with the plaintiff for his protection, which to some extent interfered with or changed the usual method of operation, went outside the scope of his employment, and that his employer was not liable for his subsequent act of negligence in violating his agreement and causing the injury to the plaintiff. We are not inclined to follow the reasoning of these cases. In each instance the defendant's employee was placed in charge of a dangerous appliance for the purpose of operating it for defendant's profit, and while thus engaged, negligently injured the plaintiff. In this action the promise made for appellant's protection was to temporarily refrain from operating the elevator below the second floor. The making of such promise, and the circumstances surrounding it, gave the operator actual notice that appellant was about to be in a position of danger should the car be operated below the second floor. The boy remained in charge of the car as respondent's employee, and it seems unreasonable to contend that, while thus employed and in charge of the car, it was not his duty to refrain from injuring the appellant.

There is a marked conflict of authority in cases of this character, and we feel constrained to approve and adopt the rule announced in the following cases: *Soderstrom v. Patten*, 131 Ill. App. 32; *Farmers & Mechanics' Nat. Bank v. Hanks* (Tex. Civ. App.), 128 S. W. 147; *Donovan v. Gay*, 97 Mo. 440, 11 S. W. 44. These cases are directly in point. In *Soderstrom v. Patten* the facts are almost identical. There a workman employed to repair an elevator shaft effected an arrangement with the elevator boy to move the car up in the

shaft and quietly remain there. The elevator, contrary to the agreement, was moved higher up in the building, causing a counterweight to strike and injure the workman. The employer of the elevator boy, as defendant in an action for damages, relied upon the identical cases now cited by respondent. We will quote at some length from the observations of the Illinois court, as being especially pertinent here. The court said:

"With some minor differences in the facts the authorities cited, and especially the Maryland case [*Hall v. Poole*] are sufficiently in point to control this case if we were obliged or disposed to follow them. They seem to hold that except in the mere matter of actually running the elevator with freight and passengers in it up and down the shaft from story to story, the elevator boy could be guilty of no negligence in the control or handling of it which could be imputed to his employer. We do not agree with the doctrine or reasoning of these cases. The Maryland case leans heavily on the New York Supreme Court case [*Jossaers v. Walker*] and concerning this latter we agree with Thompson in his commentaries on the Law of Negligence, 2d edition, Vol. 1, Sec. 528, that it is 'a decision seemingly untenable.' The elevator man was not an automaton, but a reasoning and intelligent being, put in control of the piece of machinery in question, and was therefore impliedly authorized to regulate its motions under extraordinary circumstances and in emergencies, as well as in the ordinary routine. There were not likely to be many of these extraordinary circumstances, it is true, but the rightful presence of a repairer at the bottom of the shaft, whose work would take a few minutes, was such a circumstance. The negligence of the elevator man did not depend on the promise nor consist in the breaking of it. His negligence was in so running the elevator that it injured a person not a trespasser whom he had reason to know would be likely to be injured by his so running it. The agreement or arrangement is proof that he had notice of the situation. We do not care to discuss the matter more fully. We are not prejudging the case or the facts nor foreclosing the defendant. But there is no doubt in our mind that the evidence offered for the plaintiff was sufficient to send the case to the jury. Nor is authority lacking for the conclusion to which reason leads

us. As inconsistent in principle with the decisions relied on by appellee and in point as supporting the appellant, we refer to *Siegel, Cooper & Co. v. Norton*, 209 Ill. 201, in our own state; to *Donovan v. Gay*, 97 Mo. 440, in Missouri, and to *Stephens v. Chausse*, 15 Canada Supreme Court Reports, in Canada. If the position of the appellee in this case were well taken, the negligence of a city bridge tender, who ran his bridge on a repairer, to the latter's injury, would not be imputed to the city. This court held that it could in *Gathman v. The City of Chicago*, 127 Ill. App. 150."

The elevator boy not only knew appellant was in the shaft, but knew that he was rightfully and necessarily there, engaged in work required in the completion of the building. Respondent, as owner, knew that the building was not entirely completed; that tenants were nevertheless occupying the upper floors; and that the one finished elevator was being operated for their convenience. It must have known that the presence of various workmen was indispensable to complete the building and install other elevators. The upper floors were leased for respondent's profit. Under these conditions, respondent employed the elevator boy to operate the only car then ready for use. Under such circumstances it would be unreasonable to hold that respondent did not anticipate its employee would be compelled to so discharge his duties as not to interfere with appellant and other workmen engaged in completing the building. The evidence indicates that appellant could only do his work by entering this particular shaft and remaining there some ten or fifteen minutes. The authority of the boy was to operate the elevator in a safe and sensible manner, and in harmony with surrounding circumstances and conditions which were known to respondent, the owner of the building, who had employed him. Unquestionably it was the duty of the elevator boy to so operate the car as not to injure any workman whose employment might rightfully require him to be temporarily placed in a position of danger. The boy's promise not to come below the second floor was not important except to show this actual

knowledge of appellant's presence in the shaft and as tending to excuse appellant from the charge of contributory negligence.

The conditions here differ from those in the Maryland case of *Hall v. Poole*, cited by respondent. There the building was a completed one, in which certain minor repairs became incidentally necessary. Here the respondent leased its upper floors to tenants for its own profit before its new building had been completed, and while much original constructive work remained to be performed. Respondent knew this necessary work would have to be done by various persons who would be rightfully in and about the building. It is only reasonable to hold that, if for its own profit respondent saw fit to operate the elevator, a dangerous contrivance, before the completion of its building, it became its duty to see that its employee did operate the car in such a manner as not to injure workmen who, in the necessary performance of their duties, might, to the knowledge of the elevator boy, be placed in positions of danger. In view of the circumstances, we are not willing to hold that the elevator boy was acting without the scope of his employment, or that he became appellant's servant, when, upon appellant's request, he promised to hold the car above the first floor until further notice. To so hold would be to announce the doctrine that the respondent could cause this dangerous appliance to be operated in the midst of workmen who were rightfully in the building, and that it could do so without liability for the negligence of its employee in running the elevator in such a manner as to injure a workman whom he knew to be rightfully and necessarily in the shaft.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and CHADWICK, J., concur.

[No. 9136. Department One. April 19, 1911.]

FREDERICK W. BUCHHOLZ, *Appellant*, v. ORLIN W. BUCHHOLZ *et al.*, *Respondents*.[1]

EXECUTORS AND ADMINISTRATORS—JURISDICTION—DOMICILE OF WIFE—"RESIDENT." Rem & Bal. Code, § 1284, providing that administration shall be first granted in the county in which the deceased was a resident or had his place of abode, means a "residence" in the strict legal sense, so that the domicile of a wife, under normal conditions, follows that of her husband for the purposes of administration.

DOMICILE—HUSBAND AND WIFE—RIGHT OF WIFE—REMOVAL OF DISABILITIES. Rem. & Bal. Code, § 5926, removing all the civil disabilities of a married woman was not intended to authorize a wife to establish a domocile for herself, irrespective of her husband's domicile, during the existence of the marital relation.

DOMICILE—HUSBAND AND WIFE—ABANDONMENT—RIGHT OF WIFE. The evidence shows an abandonment of the marriage relation, and of the husband's right to fix the domicile of his wife, which she may thereupon establish for herself, where it appears that they had been separated for several years and lived in different counties, the husband had leased his home for a term of five years to a widow in consideration of "boarding and lodging," had stated that he would have nothing to do with his wife, and did not visit her during her last sickness or attend her burial.

EXECUTORS AND ADMINISTRATORS — JURISDICTION — HUSBAND AND WIFE—DOMICILE OF WIFE. Where a husband has deserted his wife and has established a separate domicile, jurisdiction to probate the wife's estate depends upon her own domicile.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered February 21, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, vacating the appointment of an administrator and dismissing proceedings in the matter of an estate. Affirmed.

Jackson & Bailey and *G. G. Ripley*, for appellant.

Belden & Losey, for respondents.

[1]Reported in 115 Pac. 88.

Gose, J.—The appellant and his deceased wife, Justina, were married in 1867, in the state of Minnesota. They moved to Spokane, in this state, in 1887. The wife died at the latter place on October 15, 1908. From 1887 until her death, her actual residence had been at all times in the city of Spokane and its immediate vicinity in Spokane county. She had at no time been in Stevens county. About November, 1898, the appellant, a clergyman, was appointed to a charge embracing Stevens county and a small part of Spokane county. He continued in that district for about six years, after which his work embraced Stevens county only. Since 1906 he has not been engaged in ministerial work. Since 1898 his domicile has been in Stevens county first, and until about 1905, at a place called Addy, and thereafter at his farm at Evans. The deceased left four children, two sons and two daughters, the youngest daughter being about thirty years of age at the time of her death. She also left surviving her a grandchild, aged about thirteen years, the child of a deceased son. On November 30, 1908, upon the petition of appellant, an order was entered in the superior court of Stevens county appointing him administrator of the estate of his wife. The petition alleged, and the order recited, that the deceased was a resident of Spokane county at the time of her death. On the 25th day of October, 1909, the appellant applied for and was granted leave to file an amended petition for letters of administration. In the amended petition he alleged that the deceased was a resident of Stevens county at the time of her death. In response to his citation, the sons and daughters answered, denying that their mother was at any time a resident of Stevens county, and averred that she was a resident of Spokane county at the time of her death. Upon the issue thus joined, the case was tried to the court. The court found "that at the time of the death of the said Justina Buchholz she was a resident of, and had her place of abode in, Spokane county, state of Washington, and was not at said time a resident of Stevens county." As a con-

clusion of law the court found, "that the court is without jurisdiction in the premises, and that this action be dismissed." A decree was thereupon entered vacating the former order and dismissing the amended petition. This appeal followed.

Our statute, Rem. & Bal. Code, § 1284, subd. 1, provides that wills shall be proved, and letters testamentary or of administration shall be granted, first, "in the county of which deceased was a resident or had his place of abode at the time of his death." The appellant contends that the word "resident," as used in the statute quoted, means a legal residence or domicile. It is not claimed that the deceased had her abode in Stevens county at the time of her death. We think this court has in effect so construed the statute. *State ex rel. Baldwin v. Superior Court*, 11 Wash. 111, 39 Pac. 818. However, we have no doubt that the word "residence" is here used in its strict legal sense.

The appellant next contends that the domicile of the wife until divorced follows that of the husband, for the purpose of administration. Respondents insist that, under the provisions of Rem. & Bal. Code, § 5926:

"All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished, and for any unjust usurpation of her natural or property rights she shall have the same right to appeal in her own individual name to the courts of law or equity for redress and protection that the husband has: Provided always, That nothing in this chapter shall be construed to confer upon the wife any right to vote or hold office, except as otherwise provided by law;"

the right of the wife to establish a domicile for herself, wherever and whenever she chooses, without regard to the domicile of the husband, cannot be questioned.

We cannot think that the statute last quoted should receive so broad a construction. Its setting in the original act shows, we think, that the legislature did not have such intention. Laws 1879, pp. 77 to 82; Id., p. 151; Code 1881,

§§ 2396 to 2418. The whole scope of the act shows conclusively, we think, that the law-making body intended to confer upon the wife the right to acquire and hold property, to sue, and to be sued, to contract, etc.; and to give her equal rights with the husband in the custody of the children. To this extent her legal entity and identity were established. It seems certain that the legislature did not intend to dissolve or destroy the unity of the marriage relation. Later legislation touching the marriage relation indicates the correctness of this view, notably the statute, Rem. & Bal. Code, § 2444, which makes it a crime for the husband to wilfully neglect to support his wife. Nor can we agree with the appellant's view of the law.

We accept his statement of the law that, generally speaking, it is the privilege of the husband to fix the family domicile. His duty to maintain and support the family and his right to establish the domicile are correlative.

A further statement of the facts is essential to a proper understanding of the case. The appellant testified that, although he knew his wife was ill, he did not visit or see her for some nine or ten months preceding her death. Two or three days before her death she requested her children not to notify their father of her decease, assigning as a reason that he had not cared for her while she was alive. He was not notified of her death, and was not present at her burial. One of the sons testified that the father said to him, in speaking of the deceased, that "he was not going to have anything more to do with her." This was five or six years preceding her decease. He made a like statement to another son two or three years later. The appellant's conduct from 1898 to the date of the death of his wife confirms the truth of this testimony. His words do not square with his conduct. On December 15, 1905, he leased his home in Stevens county and the ground upon which it was situated, for a term of five years to a widow, whom he married about six months after the death of the deceased. The consideration for the

lease was that the lessee should furnish the lessor with "boarding and lodging." The appellant testified that the lessee owned the household goods in Stevens county. The appellant, from December, 1905, was only a boarder in his own home. The record speaks but one language, and that is that he did not desire or intend that his wife should share his domicile in Stevens county. This inference is too strong to be overcome by his declarations to the contrary. By his own wilful neglect of his marital duties, speaking of his conduct in the most charitable light, as we view it from the record, he destroyed the home and the marriage entity. There was nothing left but the mere shell of the marriage relation.

Where the husband has deserted the wife, or where there has been a mutual abandonment of the marriage relation so that every purpose of marriage is destroyed, the reason for the rule that the husband can fix the family domicile ceases, and the rule ceases, and the wife is then at liberty to establish a separate domicile for all purposes. *Gordon v. Yost*, 140 Fed. 79; *Town of Watertown v. Greaves*, 112 Fed. 183; *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282; *In re Florance's Will*, 7 N. Y. Supp. 578, 84 Am. St. 33, 34, note 8. In the *Gordon* case it was held that, where the husband has deserted the wife, she may be a resident and citizen of a different state from her husband, for the purpose of prosecuting a suit in a Federal court to recover for the alienation of his affections and causing his desertion. In the *Town of Watertown* case an undivorced married woman was permitted to sue in a Federal court in an action of tort for the recovery of damages for injuries caused by a defective sidewalk. The contention that she could only establish a *quasi* domicile apart from the domicile of her husband, for the purposes of divorce, was rejected. In considering the limitations of the rule that the domicile of the wife follows that of the husband, the court said:

"If the husband abandons their domicile and his wife, and

relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone make his domicile hers."

In the *Shute* case the wife was an actual resident of the state of New Hampshire at the date of her death. The husband retained a domicile in Massachusetts, but had abandoned his wife before she left that state. It was held that the wife was domiciled in New Hampshire at the time of her death. The court said that, in view of modern legislation, "no reason would seem to remain why she may not acquire a separate domicile for every purpose known to the law." *In re Florance's Will, supra*, it is said:

"If she was enough of a resident to institute divorce proceedings, as is conceded, she is enough of a resident to leave her property to her children, and to be protected from the claim of a husband with whom she had not lived for 12 years."

The word "domicile," as applied to the marriage relation, means a home where the husband and wife dwell together in amity. Whilst we think that the husband, notwithstanding the liberal provisions of our statute, has the right, under normal conditions, to fix the family domicile, there is no sound principle of law which forbids the wife, when the essence of the marriage relation has been destroyed, from establishing a separate domicile for every purpose. These views are supported in principle by *McCain v. Gibbons*, 7 Wash. 314, 35 Pac. 64, and *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9137. Department One. April 19, 1911.]

CHARLES F. KREYMBORG, *Respondent*, v. HORTON THURSTON *et al.*, *Appellants*.[1]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence or recklessness of a green hand in a shingle mill is for the jury, where he stepped into a conveyor to tramp down waste, as he had seen his instructor do a few hours before, and was thrown down upon a saw by reason of lugs in the bottom of the conveyor of which he had no notice, under circumstances raising a strong inference that he was expected to attend to the conveyor, although not directed in words to do so.

MASTER AND SERVANT—TRIAL—VERDICT—SPECIAL FINDINGS—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries, a special verdict finding that plaintiff's act of stepping into a conveyor near a cut-off saw was very dangerous from the fact that the cut-off saw was not properly guarded, and that the method employed was safe provided the cut-off saw had been properly guarded, does not show contributory negligence and is not inconsistent with a general verdict for the plaintiff, in the absence of any finding that the danger was known to the plaintiff or so obvious and apparent that a person of ordinary prudence would not have attempted the act.

MASTER AND SERVANT—FACTORY ACT—EFFECT—VIOLATION—NEGLIGENCE. The purpose and effect of the factory act requiring reasonably safe guards for all machinery in a mill which it is practicable to guard, is to make it negligence, as a matter of law, to fail to comply with the requirements of the statute.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered April 29, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a shingle mill through contact with a cut-off saw. Affirmed.

Newman & Howard (*Hurlbut & Neal*, of counsel), for appellants.

Romaine & Abrams, for respondent.

PER CURIAM.—On September 29, 1909, the respondent, while in the employment of the appellants, working in a

[1]Reported in 115 Pac. 77.

shingle mill owned and operated by them, lost his left hand by bringing his arm in contact with a cut-off saw installed in the mill as a part of its operative machinery. This action was brought to recover for the injury suffered. In his complaint the respondent set forth separately two causes of action, the one based on a charge of liability under the state factory act, and the other on the common law liability of the appellants. Issue was taken on the allegations of the complaint, and on the trial, at the conclusion of the respondent's case in chief, the appellants moved for a nonsuit as to both causes of action. The motion was sustained as to the cause of action founded on the common law liability, but was denied as to the cause of action founded on the state factory act. At the conclusion of the entire case, the appellants moved for a directed verdict. This motion was denied and the cause submitted to the jury, who returned a verdict for the respondent in the sum of $4,000. From the judgment entered on the verdict, this appeal was taken.

The evidence on the part of the respondent tended to show that he was not a regular employee of the mill; that, for some time prior to the day of the accident he had been working for the appellants in the timber getting out shingle bolts; and that on the morning of the accident the weather was stormy, and it had been decided that the timbermen should not be sent into the woods on that day. After this decision had been reached, the respondent went down to the mill, thinking he might find a boat in which he could row himself across the bay lying between the mill and the city of Blaine. As he reached the mill, one of his employers met him, told him that the mill crew was short-handed on that day, and asked him if he would not help them out; that he consented, and was told to go into the mill to a man named Wilder, who would tell him what to do; that he found Wilder in that part of the mill where shingle blocks were sawed and trimmed. It seems there was in use in this part of the mill two different machines for sawing the blocks, the one a circular cut-off saw, some 48

inches in diameter, and a drag saw operated after the manner of a crosscut saw. The cut-off saw was used to cut blocks from the timber which came to the mill in the form of bolts, while the drag saw was used to cut them from timber which came into the mill in the form of logs. Directly back of the cut-off saw was the knee-bolter saw, used to trim the shingle blocks and put them into shape for the shingle saws. Running from underneath the knee-bolter saw towards and past the cut-off saw and on out to a burner some distance from the mill, was an open chain conveyor, used to carry off the waste and refuse left from the operation of sawing and trimming the shingle blocks. The conveyor was 18 inches wide at the bottom, 30 inches wide at the top, and of a depth of 16 inches. Lying between the saws was a place called the deck, on which the blocks cut from logs were split into suitable sizes for handling by the knee-bolter.

When the respondent entered the mill after the meeting with his employer, the mill crew had just finished cutting blocks with the cut-off saw, and a log had been drawn into the chute where the drag saw was operated. The respondent was told to assist in getting the log into a position where the saw could be used upon it. This he did, when he was told to take the blocks as they were cut from the log, split them into convenient sizes for the knee-bolter to handle, and place the split pieces within the knee-bolter's reach. After working at this for a while, he discovered that refuse from the logs had accumulated on the deck in such a quantity that it materially interfered with his work. To get it out of the way he started to scuff it off into the conveyor with his feet, when Wilder, the knee-bolter, pointed to a scoop shovel standing in a corner of the mill, and by motions indicated that he could use it for the purpose of cleaning the deck. The respondent thereupon got the shovel and shoveled the waste into the conveyor. This caused the conveyor to clog, whereupon Wilder left the knee-bolter pit, came over and removed the clog by getting into the conveyor and stamping and scuffing the

waste with his feet. As the work progressed the respondent found it necessary from time to time to again clear the deck by shoveling the waste into the conveyor. As he did so he discovered that the conveyor had again clogged at a place a short distance from the cut-off saw. This saw had been left in motion during the time the respondent had been in the mill, although apparently without necessity. To remove the clog, he went over and got into the conveyor with his feet, as he had seen his instructor do on the previous occasion. The conveyor chain had fastened onto it, at distances approximately 12 feet apart, lugs four inches high, a fact the respondent was not aware of. As he stood in the conveyor one of these lugs caught his feet, dragged them from under him, and caused him to fall backward towards the revolving cut-off saw. In the fall his arm came into contact with the saw, causing the injury for which he sues.

The appellants' first and principal contention is that the facts do not justify a recovery. They argue that the respondent acted without instructions when he got into the conveyor with his feet to remove the accumulated debris, and further that the act was one so hazardous in its nature that it was not to be supposed that an ordinarily prudent person would undertake it. But these were questions for the jury. While the respondent was not directed in words to keep the conveyor clean, the inference that he was expected to do so seems to us to scarcely admit of a doubt about the matter. At any rate, the inference is sufficiently strong to make the question one for the jury, and we are bound by the verdict. So with the contention that the act itself was so reckless as to forbid a recovery. While it looks foolhardy, in the light of what happened, it cannot be said that no ordinarily prudent person would have undertaken it, having only such knowledge of the danger of the act as the respondent possessed. He did not know there were lugs on the conveyor chain to drag him down, and his instructor had performed the same act with safety but a few hours before.

Certain special interrogatories were submitted to, and answered by, the jury, among which were the following:

"Was the act of the plaintiff in stepping into the conveyor near to the cut-off saw and attempting to loosen refuse with his feet a very dangerous act? (Answer)—Yes, from the fact that the cut-off saw was not properly guarded. (Interrogatory No. 12)—Was the method employed in getting into the conveyor and attempting to loosen refuse with his feet a safe method? (Answer)—Yes, provided cut-off saw had been properly guarded."

It is argued that the answers to these interrogatories are contrary to the general verdict, because the jury found the act of the respondent in stepping into the conveyor "a very dangerous act"; in other words, it is contended that the jury by these findings found the respondent guilty of contributory negligence, which is contrary to the general verdict which found the appellants liable to answer for the injury. But we think the appellants place a wrong construction on the special verdict. The fact that the act performed by the respondent may have been dangerous does not of itself convict him of contributory negligence. Before he can be so convicted, he must have known of the danger, or the danger must have been so apparent and obvious that a person of ordinary prudence would not have attempted the act. The special findings made by the jury do not cover these questions.

The court gave to the jury the following instruction:

"You are instructed that the law of this state in force at the time of the injury to the plaintiff alleged in this case, and known as the 'Factory Act,' provides that any person, firm or corporation operating a mill where machinery is used, shall provide and maintain in use reasonable safe guards for all saws which it is practicable to guard, and which can be effectively guarded with due regard to the ordinary use of such machinery and the danger to employees therefrom and with which employees of any such mill are liable to come in contact with while in the performance of their duties. You are instructed that if you find that the cut-off saw complained of in this case, and upon which it is alleged the plaintiff was in-

jured, was unguarded and unprotected, and that it was practicable to guard the same effectively, having due regard for the use of the same, then under the law it would be your duty to find the defendants negligent in that regard; but if you find from the evidence that the cut-off saw on which plaintiff was injured was as well and as practicably guarded as was consistent with its ordinary use, and that any further or additional guards would have impaired its use or rendered its use more dangerous, the defendants would not be guilty of negligence under the law."

It is contended that the court erred in giving this instruction, since it assumed therein, as a matter of law, that failure on the part of the appellants to guard the saw on which the respondent was injured, if it was practicable to guard the same, was negligence; contending that the question whether or not it was negligence to fail to guard the saw was for the jury and not for the court. But we think the court correctly defined the purpose of the factory act. We think it was intended by the act to make it negligence, as a matter of law, for operators of machinery, around which their employees are compelled to work, to fail to guard such machinery when it is practicable so to do. This being the purpose of the act, it was not error for the court to so charge the jury.

We find no error in the record, and the judgment will stand affirmed.

[No. 9175. Department One. April 21, 1911.]

SPOKANE & EASTERN TRUST COMPANY, *Appellant* v. ANDREW M. I. HUFF, *Respondent*.[1]

BANKS AND BANKING—CHECKS—PAYMENT—MISTAKE. Where a bank paid a check drawn upon it under the mistaken belief that the drawer had funds there subject to check, it cannot recover the payment from the payee, since that would destroy the certainty pertaining to such transactions; and it is immaterial that the mistake was due to the confusion incident to paying the check after banking hours, as an accommodation, when the drawer's deposits had been withdrawn the same day.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 14, 1910, upon sustaining a demurrer to the complaint, dismissing an action to recover money paid on a check by mistake. Affirmed.

Warren W. Tolman, for appellant.

Danson & Williams, for respondent.

FULLERTON, J.—The appellant is a banking corporation, and receives money on deposit subject to check by its depositors. On the morning of October 6, 1909, one Edwin J. Schloss had on deposit in the appellant's bank subject to check the sum of $297, and one Leon J. Schloss had on deposit therein subject to check the sum of $48. During the banking hours of that day the Schlosses severally withdrew their respective deposits. On the same day, and about one hour after the bank had closed its doors to the general public, the respondent, Andrew M. I. Huff, appeared at the bank with the check of Edwin J. Schloss for the sum of $297, and the check of Leon J. Schloss for the sum of $48, both dated upon that day, and presented the checks to the bank's assistant secretary for payment. The assistant secretary thereupon caused inquiry to be made of the book-

[1]Reported in 115 Pac. 80.

keeper and the paying teller of the bank to ascertain whether the drawers of the checks had sufficient funds on hand to meet the checks, and on being informed that they had, paid the checks to the respondent. When the books of the bank were balanced for the day, the overpayment was discovered, and on the next day the checks were tendered the respondent and repayment of the sums demanded. Repayment was refused, whereupon the present action was brought to recover the amount so paid.

In the complaint, in addition to the foregoing facts, it was alleged that, at the time of the payment, the bank had ceased for that day the transaction of business with the public, a fact that the respondent well knew; that it paid the money after business hours as an accommodation to the holder of the checks; that the reason it did not discover that the depositors drawing the checks had withdrawn their funds was owing to the confusion incidental to the closing of the business of the bank for the day; and that the respondent "did not by reason of said payment so change his position that he would be prejudiced by repayment of the money so paid to him." To the complaint a demurrer was interposed, which the court sustained. Later on a judgment of dismissal was entered, and the appeal followed.

It is a general rule, sustained by almost universal authority, that a payment, in the ordinary course of business, of a check by a bank upon which it is drawn, under the mistaken belief that the drawer has funds in the bank subject to check, is not such a payment under mistake of fact as will permit the bank to recover the money so paid.

In *Hull v. Bank of South Carolina*, Dudley (S. C.), 259, the court, passing upon the question, used this language:

"This question is to be decided rather by authority than general reasoning on the subject. No part of a commercial community is more interested in commercial usages than banks, and they cannot complain when they are required to strictly conform to them. They cannot always guard against fraud and imposition, but they may against mistakes, de-

pending on an inspection of their own books and accounts. Mistakes may be prevented which cannot be remedied. They accepted and paid the check presented by the defendant, for and on account of Hopton the drawer, whose money they had kept for his convenience and accommodation. The privity of contract was between them and their customer Hopton, and not between them and one who may have happened in the course of dealing to present a check drawn by Hopton. . . . A bank check has all the characteristics of bills of exchange, and cannot be distinguished from them. Indeed they perform not only all the offices of bills, but are more generally used for the transfer and payment of moneys. They are mercantile agents which should not be crippled in their daily and hourly operations. Before one reaches the bank after it has been drawn, it may have paid and discharged many debts, and after it has been accepted and paid, all the intervening holders in general are discharged from all liabilities to the bank; it becomes then a transaction between the bank and the drawer, the bank not infrequently paying money on checks of the drawer, when in fact he has no deposit."

In *First Nat. Bank of Detroit v. Burkham*, 32 Mich. 328, Judge Cooley, writing for the court, used these words:

"But we think it would be an exceedingly unsafe doctrine in commercial law, that one who has discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterwards hold the moneys subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment. The beauty and value of the rules governing commercial paper consist in their perfect certainty and reliability; they would be worse than useless if the ultimate responsibility for such paper, as between payee and drawee, both acting in good faith, could be made to depend on the motives which influenced the latter to honor the paper."

So in *Oddie v. National City Bank of New York*, 45 N. Y. 735, 60 Am. Rep. 160, Church, Ch. J., discussing the question, said:

"When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any

other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote* (9 N. Y. 463), but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise."

In *Manufacturers' Nat. Bank of Baltimore v. Swift*, 70 Md. 515, 17 Atl. 336, 14 Am. St. 381, it was said:

"It is the duty of a bank to know the state of its depositor's account, and if it makes a mistake in this respect it must abide the consequences. The presentation of a check is a demand for payment; if it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles, if when it was ready and willing to pay a check, it permitted the holder to enquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality. And the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder."

In *National Bank of New Jersey v. Berrall*, 70 N. J. L. 757, 58 Atl. 189, 103 Am. St. 821, 66 L. R. A. 599, it was said:

"As between the holder of a check and the bank upon which it is drawn, the latter is bound to know the state of the depositor's account. Before paying the check it must take into consideration whether it was drawn against funds and whether the order for payment, evidenced by the check, has subsequently been revoked. Therefore, where a bank receives in the ordinary course of business a check, drawn upon it and presented by a *bona fide* holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or

not to pay, and the transaction is closed as between the parties to the payment."

See, also, *Citizens' Bank of Norfolk v. Schwarzschild & Sultzberger Co.*, 109 Va. 539, 64 S. E. 954, 23 L. R. A. (N. S.) 1092; *Boylston Nat. Bank v. Richardson*, 101 Mass. 287; *Riverside Bank v. First Nat. Bank of Shenandoah*, 74 Fed. 276; *National Bank v. Burkhardt*, 100 U. S. 686; *City Nat. Bank of Selma v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697; *Consolidated Nat. Bank of New York v. First Nat. Bank of Middletown*, 129 App. Div. 538, 114 N. Y. Supp. 308; Morse, Banks and Banking (4th ed.), § 455.

But while the courts are uniform in holding that a bank cannot recover under the circumstances cited, they are not agreed upon the principle upon which the rule prohibiting a recovery rests. Some of them, it will be observed, put it on the ground of want of privity between the holder of the check and the bank; others upon the ground that the payment is not a payment by mistake within the meaning of the rule that permits a recovery; others, again, on the ground that to permit the bank to repudiate the payment would destroy the certainty that must pertain to commercial transactions of this sort if they are to remain useful to the business public. To our minds the latter reason is the most satisfactory. If, for example, a merchant conducting a retail business must hold the money he receives from the bank in payment of check and drafts, taken in by him from his customers in payment for the purchase of goods, until such reasonable time as the bank has to determine whether or not it will call upon him for a return of the money, it is manifest that he must discard the use of checks and drafts in the conduct of his business and require his customers to bring him cash. The uncertainty, delay, and annoyance such rule would cause him would forbid their use in his business.

Concluding, as we do, that the bank cannot recover if the checks in question were received and paid by it in the ordinary

course of business, it remains to inquire whether the special circumstances set out in the complaint relieve it from the rule. It is our opinion that they do not. The matters which are thought to relieve the bank of blame were of its own choosing. The holder of the checks in no way contributed to the mistake, and the fact that the bank officers were more liable to make a mistake at this particular time than some other, may prove the officers themselves more culpable, but it cannot change the effect of the mistake.

The judgment is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

[No. 9266. Department One. April 21, 1911.]

MARK MICHAELSON *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — AUTHORITY—PROPERTY DAMAGED—JUDGMENT — JURISDICTION — PRESUMPTIONS. Under Laws 1905, p. 92, § 22, prohibiting the assessment for benefits of lands found by the jury or court to be damaged, a judgment, on a verdict awarding damages, adjudicating that the land is also liable to assessment, while outside of the ordinary issues provided by statute or settled by the verdict, is not necessarily void for want of jurisdiction appearing on its face, since such adjudication may have been submitted on stipulation or consent, and it is *prima facie* valid as a judgment of a court of general jurisdiction, although it did not recite the jurisdictional facts authorizing the assessment.

SAME—ASSESSMENTS—JUDGMENT—VACATION—WANT OF JURISDICTION—EVIDENCE—ADMISSIBILITY. An action by property owners to cancel an assessment for benefits upon lots which the jury had found to be damaged, in violation of the statutory prohibition, and to vacate that portion of the decree entered on the verdict which adjudicated that the lots were also liable to assessment, on the ground that the same was outside the issues and beyond the jurisdiction of the court, is a direct attack upon the decree; and the plaintiffs are entitled to overcome the presumption of jurisdiction

[1]Reported in 115 Pac. 167.

by evidence that such adjudication was not upon any issue involved in the case, that they never had any notice of any such issue, by pleading, or stipulation, or any notice of such portion of the judgment, which would accordingly be void for want of jurisdiction.

SAME—ESTOPPEL TO ATTACK JUDGMENT—ACCEPTANCE OF BENEFITS—NOTICE. Where a judgment on a verdict awarding damages to lands in a condemnation case also adjudicated that the lands were liable to assessment for benefits, contrary to the prohibition of the statute and without any jurisdiction therefor, the property owners are not estopped to attack the assessment and such adjudication by reason of their acceptance of the award of damages and satisfaction of the judgment on the execution docket, in ignorance of the invalid portion of the judgment decreeing that the lands were subject to assessment.

COSTS—ON APPEAL—PARTIES ENTITLED—DISCRETION OF COURT. In an action to vacate a judgment for want of jurisdiction and cancel an assessment for benefits, in which the trial court erroneously rejected respondents' offer of evidence to overcome the presumption of jurisdiction, upon objection made by the city, but also erroneously vacated the judgment as void on its face, upon appeal by the city and reversal with remand to receive the evidence excluded at appellant's instance, the costs on appeal are within the discretion of the appellate court, under Rem. & Bal. Code, § 1744, and will be awarded to the respondents, since they were forced into the appellate court wholly without fault.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 25, 1910, in favor of the plaintiffs, after a trial before the court without a jury, in an action to vacate a portion of a judgment rendered in condemnation proceedings, and for the cancellation of an assessment for a public improvement. Reversed.

Scott Calhoun, James E. Bradford, O. B. Thorgrimson, and *Leander T. Turner,* for appellant.

Will H. Thompson and *Jas. A. Snoddy,* for respondents.

PARKER, J.—The plaintiffs seek to have decreed void a judgment rendered in a condemnation proceeding, prosecuted against them by the city of Seattle, upon a verdict of a jury awarding them damages for injuries to certain lots in the widening and changing of the grade of certain streets, in so

far as the judgment assumes to adjudicate that the lots are liable to assessment for the improvement; and, also, to cancel the assessment levied upon the lots to pay the cost of the improvement. From a decree in the plaintiffs' favor, the city has appealed.

Under chapter 55, Laws 1905, page 84, the city of Seattle, in May, 1906, passed an ordinance providing for the widening and changing of the grades of certain streets in the city of Seattle, for the institution of condemnation proceedings against the owners of abutting property damaged thereby, and for the payment of the cost and expenses thereof by special assessment upon the property benefited by the improvement. Respondents were then, and still are, owners of two lots, portions of which were taken, and the remainder of which abut upon the improvement. Condemnation was commenced and prosecuted under the ordinance, resulting in a verdict and judgment in respondents' favor, awarding them $5,950 for the taking of a portion of the lots, $4,000 for the damage to the remainder of the lots by reason of the taking, and $1 for damage to the remainder of the lots by reason of the change of the grades of the streets. Thereafter judgment was prepared by counsel for the city, and entered in usual form upon the verdict, except that it concluded with the words as follows: "Provided that said property shall be liable to assessment for the actual improvement of said street." Thereafter respondents received from the city the amount awarded to them by the verdict and judgment, and satisfied the same upon the execution docket by endorsement thereon. This was evidently done in the usual manner provided by Rem. & Bal. Code, §§ 454, 953.

Thereafter the city proceeded with the improvement, and assessed the cost thereof against the property claimed by it to be benefited thereby. Among the property so assessed, were the remaining portions of the two lots of respondents which had been found by the jury to be damaged by reason of the taking of portions thereof and the change of the grades of

the streets. The remaining portions of respondents' lots were so assessed in the sum of $8,055.96. While this assessment was levied by the city to pay for the physical improvement, and was not levied by eminent domain commissioners to pay damages awarded by the jury to other property owners, we think it is plain, from the record before us, that the physical improvement for the payment of which the assessment was so levied, constitutes a part of the whole scheme and improvement contemplated by the terms of the ordinance under which the condemnation was instituted and prosecuted. We do not understand that the city seriously contends to the contrary. Other facts will be noticed as may become necessary in our discussion of the contentions of counsel.

The theory of the learned trial court, in rendering its decree in respondents' favor, apparently is that the city was wholly without power to levy any assessment upon the remaining portions of the lots of respondents, because of the finding of the jury that such remaining portions of the lots were damaged, and that the concluding words of the condemnation judgment, providing that the lots should be liable to assessment, was an attempt to adjudicate a question wholly beyond the jurisdiction of the court upon the trial of the issues then before the court. This is undoubtedly a correct theory of the case under the law of this state, unless the court acquired jurisdiction to adjudicate such questions at that time and in that judgment by consent of the respondents. *Seattle & Puget Sound Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093; *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106; *Smith v. Seattle*, 41 Wash. 60, 82 Pac. 1098. The very statute under which this condemnation and improvement was prosecuted provides:

"That no lot, block, tract or parcel of land shall be assessed a greater amount than it will be actually benefited, nor shall any lot, block, tract or parcel of land which shall have been found by the jury or court to be damaged be assessed for any benefits." Laws of 1905, page 92, § 22.

It is clear, therefore, that the power of the city to levy this assessment rests wholly upon the concluding provision of the condemnation judgment, and the validity of that provision as a judgment upon that question. If that provision in the judgment does not give the assessment legal support, it was levied without any power, jurisdiction, or authority whatever on the part of the city, so far as this record shows.

The record in this case is in a peculiar condition, in so far as it bears upon the question of the court's jurisdiction to determine, in the condemnation judgment, the question of the remaining portions of the lots becoming assessable for the cost of the improvement. Respondents, for the purpose of showing that the condemnation judgment is void in so far as it is assumed thereby to adjudicate that the lots are assessable, alleged in their complaint as follows:

"That subsequent to the return and entry of said verdict, and without any notice to the said plaintiffs, the said city of Seattle, without warrant or authority of any law or otherwise for so doing, and contrary to law, and without the knowledge or consent of said plaintiffs, or of either of them, presented to the superior court of the state of Washington for King county in said cause No. 52280 a form of, and said court on the 13th day of March, 1907, signed and entered, a judgment purporting to be based upon said verdict, by which said judgment the said court, upon the application of said city of Seattle, in addition to awarding to these plaintiffs the said damages found and awarded by said jury in said verdict, pretended and attempted to adjudge and decree 'that said property shall be liable to assessment for the actual improvement of said street.' That said pretended additional judgment and decree is without the issues submitted to the jury upon the trial, and is in excess of and beyond the findings of said jury, as disclosed by its verdict, and is not supported by any verdict of the jury, and said pretended additional judgment and decree is contrary to law. That said plaintiffs had no notice or knowledge of the presentation or signing of said judgment by said court, and never discovered that said judgment contained said provision relating to the assessment of said property for the actual improvement until within ten days prior to the institution of this action."

The city, by its answer, denied these allegations, except that such a judgment was entered. The city further pleaded as an affirmative defense, in substance, that the verdict and judgment, including the concluding provision, were rendered in pusuance of a stipulation entered into between the city and respondents, wherein it was mutually agreed that the remaining portions of the lots should be liable to assessment for the cost of the improvement, notwithstanding any award of damage to respondents for injuries resulting to such remainder. Replying to this affirmative defense, respondents denied entering into any stipulation whereby they agreed that the remaining portions of their lots might be assessed for the costs of the improvement, and denied that the verdict and judgment were rendered in pursuance of any such stipulation.

Upon the trial, counsel for respondents offered evidence tending to prove that neither the respondents nor their attorney in the condemnation proceeding had any notice or knowledge whatever of the fact that the judgment in that proceeding provided that the remaining portion of the lots should be liable for the costs of the improvement, until within a short time prior to the commencement of this action, and also offered evidence tending to prove that there never was any stipulation or agreement made by or on behalf of respondents to that effect, and that such question was without the issues then before the court. Counsel for the city objected to the introduction of such evidence, upon the ground, in substance, that respondents and their attorneys having appeared in that proceeding, and having satisfied the judgment in so far as it awarded damages to them, were bound to know the contents of the judgment, and were bound by the judgment as a final adjudication upon the question of the lots being assessable, as well as upon the amount of damages and the city's right to take and damage the lots. The court sustained these objections and refused to receive the evidence offered, but evidently not upon the grounds urged by counsel

for the city, since that would have necessarily resulted in the court's denial of the relief prayed for by appellant, which relief it eventually granted.

The remarks of the learned trial court plainly indicate that he rejected the evidence upon the theory that, because of the manner in which the issues were raised by the pleadings, the burden of proving these jurisdictional facts was upon the city. Counsel for the city could not have been mistaken as to these views of the court expressed, when the objection was sustained and the evidence rejected at their instance. The court did, however, let counsel for respondents proceed with their evidence along this line far enough to show that no notice of the proposed entry of the judgment in the condemnation proceeding, and no copy thereof, was ever served upon respondents or their attorney in that proceeding; and also that, when the judgment was satisfied, respondents and their attorney saw only the execution docket, where the judgment was entered in usual form and where they endorsed satisfaction thereof. The city offered no evidence whatever tending to show that there was a stipulation upon which that portion of the judgment adjudging the lots assessable for the improvement was based, nor any evidence to show that that question was in any manner then submitted to the court for decision; nor did it offer any evidence whatever tending to show that respondents ever had any notice or knowledge of that portion of the judgment adjudging the lots assessable. Counsel for the city were evidently resting upon the assumption that the burden of proof was upon respondents to prove want of jurisdictional facts to support that portion of the judgment, notwithstanding the court had in effect ruled to the contrary. This left the validity of that portion of the judgment to be determined by what appeared upon its face alone. The copy of the judgment introduced in evidence in this case contains no recitals whatever indicating in what manner that question was submitted to the court by the parties, giving it jurisdiction to determine the same. So the

problem then before the court was reduced to the simple question, Is this concluding provision in the judgment void upon its face for want of jurisdiction? That the questions in the case became so narrowed was no fault of respondents or their counsel. They had offered the proof we have mentioned, and saved their exceptions to the court's ruling rejecting such proof. We are compelled, because of the exclusion of this offered proof, to confine ourselves within the same narrow limits, so far as determining the technical correctness of the final decree rendered by the court in respondents' favor is concerned. That decree must have been rendered upon the theory that the judgment in the condemnation proceeding, in so far as it adjudicated that the lots were assessable, was void upon its face, since nothing else than the judgment itself was before the court upon the question of its validity. The court had excluded the offered evidence tending to show want of jurisdictional facts upon which it must rest.

It seems to us that the question of whether or not a lot in Seattle is liable to assessment for a city local improvement such as is here involved is a subject-matter so clearly within the jurisdiction of the superior court for King county as to need no argument for demonstration. That is a court of general jurisdiction, and having rendered that portion of the judgment assuming to determine thereby that the lots are assessable, in a proceeding where that question might have been submitted to the court for adjudication, we cannot say that such an adjudication is without the jurisdiction of the court, simply because the judgment upon its face fails to affirmatively show jurisdictional facts upon which such adjudication could rest. The very fact that the court adjudicated such question by its judgment is enough to show *prima facie* that it had jurisdiction so to do. That such a question may be adjudicated in a condemnation judgment upon stipulation of the parties has been recognized by us in *James v. Seattle*, 57 Wash. 318, 106 Pac. 1114, and *Seattle Transfer Co. v. Seattle*, 62 Wash. 269, 113 Pac. 627. We

are of the opinion that, upon the record as made in this case, the trial court was in error in rendering its decree in respondents' favor.

However, it does not follow that respondents are not entitled to such a decree in their favor, upon proof of the facts they alleged and offered to prove upon the trial. The court may have had unquestioned jurisdiction over the subject-matter it assumed to adjudicate by the concluding provision of the condemnation judgment, and it may be presumed to have rightfully exercised that jurisdiction by the rendering of such judgment, but that does not conclude respondents from alleging, in a proper action, as this is, and proving, if they can, that such adjudication was not upon any issue involved in the condemnation trial; that they never had any notice by process, pleading, or stipulation of any nature that such question was sought to be adjudicated by the condemnation judgment; and that no notice of such attempted adjudication ever came to them until after the entry of the judgment. Respondents had as much right to prove these facts, for the purpose of showing want of jurisdiction in the court to render such a judgment, as they would, in a proper action to set aside any judgment rendered against them, to prove that no process was ever served upon them in such action giving the court jurisdiction to render a judgment against them therein. This was not a question involved in the trial of the condemnation proceeding so as to enable the court to render a judgment thereon at that time, unless the parties in some form then voluntarily submitted such question to the court, or consented in some way to such a judgment thereon. It was in no way involved in the ordinary process or pleadings in such a proceeding so as to give notice to respondents that it would be adjudicated by the judgment to be rendered upon the verdict of the jury awarding them damages. The finding of damages in such a condemnation trial, in a defendant's favor, may or may not render his property thereafter assessable, but the court has no jurisdiction to

render a judgment adjudicating that question upon such a trial and verdict, unless the parties in some manner then voluntarily submit that question to the court for adjudication. The ordinary issues of such a trial call for no judgment other than as to the right of the city to appropriate, and the amount of defendant's damages therefor as found by the jury. We do not go so far as to hold that the judgment upon its face is void because of the nature of the proceedings and the verdict for damages to the remainder of the lots, though the verdict recited in the judgment does suggest a probable want of jurisdiction to adjudicate that the lots are assessable. We do hold, however, that respondents have the right to overcome the presumption of jurisdiction to render that portion of the judgment, by proof of the facts alleged and offered in evidence by them in this case. This is a direct attack upon that portion of the judgment. While counsel for respondents insist that the judgment is void upon its face, the action was brought in such form as to also directly attack the judgment for want of jurisdictional facts to support it. Such want of jurisdictional facts was clearly pleaded in their complaint, and if proven, the judgment must be held void, in so far as it is therein assumed to adjudge the lots assessable. *Johnson v. Gregory*, 4 Wash. 109, 29 Pac. 831, 31 Am. St. 907; *Waterman v. Bash*, 46 Wash. 212, 89 Pac. 556; *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837; *Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777.

It is true that this is not a question of failure to serve the usual process upon respondents in the condemnation case, nor is it a question of acquiring jurisdiction to determine questions ordinarily involved in such a proceeding; but it is rather a question of jurisdiction to determine questions not involved in the issues presented to the court under that process, or otherwise submitted by the parties for decision. Clearly, that process did not bring the defendants into court for the adjudication of such question. For the court to assume to adjudicate the rights of parties to an action or

proceeding which are not brought in issue therein by process, pleading, or consent, is in principle the same as for the court to assume to adjudicate rights without any service of process upon the parties against whom such adjudication may be made. In the case of *Reynolds v. Stockton*, 140 U. S. 254, the supreme court of the United States, in holding a judgment void for want of jurisdiction in so far as it assumed to adjudicate a matter not in issue in the cause, said, at page 265:

"The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

Apparently, in that case there was no issue involving the matter adjudicated, at the time of defendants' answer, and since they did not thereafter appear or participate in the cause, the matter foreign to the issues was adjudicated without hearing the defendants thereon. If respondents' offered proof is true, that is the situation, in substance, here. The only difference is that the foreign matter here involved was

first brought into the cause at the rendering of the judgment in the absence of respondents, if respondents' offered proof be true. The case of *Anderson v. Burgoyne, supra,* was decided by this court upon this principle. *Reynolds v. Stockton,* 43 N. J. Eq. 211, 10 Atl. 385, 6 Am. St. 877; *Gille v. Emmons,* 58 Kan. 118, 48 Pac. 569, 62 Am. St. 609; *Unfried v. Heberer,* 63 Ind. 67; *Seamster v. Blackstock,* 83 Va. 232, 2 S. E. 36, 5 Am. St. 262; *Falls v. Wright,* 55 Ark. 562, 18 S. W. 1044, 29 Am. St. 74, and note 78.

In the case of *Oates v. Shuey,* 25 Wash. 597, 66 Pac. 58, this court held that the community interest of the wife, acquired before the husband executed a mortgage upon the property as his separate property, being a paramount title to that sought to be mortgaged, the wife's community rights could not be litigated in a foreclosure of the mortgage, even though she was personally served in the foreclosure suit and it was alleged that the property was the separate property of the husband. She did not appear and the decree was held void for want of jurisdiction, in so far as its terms appeared to divest her of her paramount community interest. This holding is not overruled by *Coolidge v. Schering,* 32 Wash. 557, 73 Pac. 682, where it is held that a question of paramount title can be litigated by consent of the parties in the foreclosure suit. This only means that the court, having jurisdiction over the subject-matter, it can acquire jurisdiction over the parties to adjudicate such subject-matter by consent. We are of the opinion that, under the issues of fact in this case, respondents are entitled to introduce evidence to prove that there was a want of jurisdictional facts to support the adjudication of the court in the condemnation proceeding that the remaining portions of the lots were liable to assessment, as they have alleged in their complaint. If they can successfully prove such facts, they will be entitled to a decree adjudging that portion of the condemnation judgment void.

If such evidence is sufficient to show want of jurisdictional facts: to wit, want of submission of the question to the court,

or consent to such an adjudication in some form by respondents, it will then become immaterial what knowledge of the entry of such judgment may have been acquired by respondents after the entry thereof. If the judgment can be proven to be void for want of the jurisdictional facts to support it when entered, it will not be rendered otherwise by knowledge which might come to respondents after its rendition.

Some contention is made that respondents ought to be held to be estopped to deny the validity of the portion of the condemnation judgment adjudicating their lots to be assessable, because they accepted the fruits of the verdict and the other portion of the judgment awarding them damages, and hence, must have learned of that portion of the judgment providing that their lots should be assessable. It is easy to see how it is possible for respondents to have satisfied this judgment, in so far as it awarded them damages, without at the same time learning that it contained the provision here complained of. That provision would not be at all likely to appear upon the execution docket, where we all know there is little else than a brief abstract of the judgment entered, showing the title of the cause and the date and amount of the judgment. When one goes to satisfy a money judgment he may have no occasion to see or examine any part of the record other than this entry in the execution docket. That would show the amount of the judgment, and is also the place where the endorsement of its satisfaction is to be made. Rem. & Bal. Code, § 454. And if it be against a municipal corporation, a transcript of its entry upon the execution docket, after endorsing satisfaction upon the docket, is taken by the judgment creditor to the proper officer of such municipal corporation where he receives payment. Rem. & Bal. Code, § 953.

There may be some remarks of the court in *James v. Seattle*, 57 Wash. 318, 106 Pac. 1114, which might be construed to indicate that we regard the satisfaction of the judgment in a condemnation case as a waiver of the right of a defendant therein to object thereafter to a provision in the judgment

like that here involved. In that case, however, the defendant was held so estopped because, as the court there said, near the bottom of page 319, "The court had jurisdiction over the parties and the subject-matter." In view of the fact that in that case the defendants had expressly stipulated that their damaged lots could be assessed for the improvement notwithstanding the award of such damages, the court was referring to the jurisdiction over both the subject-matter and the parties which that stipulation gave. Now, while it is true that this adjudication that the lots shall be assessable happens to be appended to, and is physically a part of, the same writing which evidences the court's judgment upon the award, it is, in substance and in fact, a separate judgment from the judgment upon the award of damages. Respondents had no alternative but to submit to the judgment upon the award. The court clearly had jurisdiction of that question, and its judgment thereon in any event resulted in the loss to respondents of a portion of their lots and in damage to the remainder; for the city by that judgment became entitled to take such portion of the lots and to damage the remainder, regardless of whether respondents accepted the award or not. So, the mere fact that respondents accepted the award which was to go to them as the measure of their value of property rights, which the city in any event, by force of that judgment, was taking away from them, should not estop them from contending that the adjudication that their lots were assessable was void for want of jurisdiction to make such adjudication. As said before, this in any event occurred after the rendition of the judgment, and if this portion was void when rendered, the acceptance of the award would not render it otherwise. Because a party accepts the benefit of one judgment, does not estop him from denying the validity of another judgment rendered upon a question as to which he was never heard.

We are of the opinion that the decree of the trial court must be set aside, and the cause remanded to that court with directions to permit the respondents to offer evidence in

support of their contention that there never existed any jurisdictional facts upon which the court could adjudicate that the remaining portions of their lots should be liable to assessment for the improvement, and for such further proceedings as are not inconsistent with this opinion. It is so ordered.

There only remains for our disposition the question of costs in this court. While our disposition of the cause may, in a technical sense, be regarded as being in city's favor by a reversal of the decree of the trial court, we think, in a broader sense, our disposition of the cause upon this appeal cannot be regarded as in favor of the city any more than the respondents. This view, under Rem. & Bal. Code, § 1744, renders the question of costs within the court's discretion. In view of the offer of proof made by counsel for respondents, the objections thereto made by counsel for the city, the sustaining of such objections by the court, and respondents' exceptions thereto, and thereafter the rendering of the decree in the trial court in respondents' favor giving them no occasion to appeal, we feel that they are forced into this court wholly without fault of their own, and are entitled to recover their costs from the city incurred upon this appeal. It is so ordered.

GOSE, FULLERTON, and MOUNT, JJ., concur.

[No. 9224. Department One. April 21, 1911.]

SEATTLE SCHOOL DISTRICT No. 1, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

SCHOOLS AND SCHOOL DISTRICTS — POWERS — OFFICERS — ASSESSMENTS—WAIVER OF EXEMPTIONS. A petition by a school district for the improvement of a street, agreeing to pay its just proportion of the cost of the improvement irrespective of any award of damages, is not *ultra vires*, or beyond the power of the school district officers, although the law exempts from assessment lands found by the jury to be damaged.

MUNICIPAL CORPORATIONS—ASSESSMENTS — OBJECTIONS — WAIVER. A petition of property owners for a street improvement agreeing to pay the cost of the improvement irrespective of any award of damages, waives their right to object to the assessment of their land on the ground that the jury found the same to be damaged, and is *prima facie* sufficient to confer jurisdiction on the court to make the assessment irrespective of the award.

SAME—ABROGATION OF WAIVER—DECREE—VACATION. Where property owners, in their petition, waived their right to object to the assessment of land which the jury found to be damaged, they may, in a direct attack to vacate the judgment for want of jurisdiction, show that the waiver was abrogated, that the court had no jurisdiction to make the assessment, and it is error to exclude evidence thereof.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 25, 1910, in favor of the plaintiff, after a trial before the court without a jury, in an action to vacate a portion of a judgment in condemnation proceedings, and for the cancellation of an assessment to pay the cost of a local improvement. Reversed.

Scott Calhoun, *James E. Bradford*, *O. B. Thorgrimson*, and *Leander T. Turner*, for appellant.

R. W. Prigmore, for respondent.

PARKER, J.—This is a companion case to *Michaelson v. Seattle*, *ante* p. 230, 115 Pac. 167, and involves a controversy

[1]Reported in 115 Pac. 173.

of the same nature. It grows out of the same condemnation proceedings, a verdict and judgment rendered therein of the same nature, and an attempted assessment of the remaining portion of the damaged property of the school district to pay the cost of the improvement. As in the *Michaelson* case, the trial court granted the school district relief, and set aside the assessment upon the ground that the verdict awarding damages for the remaining portions of the property rendered it nonassessable, and that the portion of the condemnation judgment assuming to adjudicate otherwise is void, making substantially the same rulings as to the burden of proof being upon the city to show that that question was properly before the court for adjudication. We will only notice the questions here presented, in so far as they differ from those in the *Michaelson* case.

In this case counsel not only offered to show that there was no existing stipulation at the time of the trial consenting to the provision in the condemnation judgment adjudicating that the remaining portion of the land should be assessable, but went further and offered to prove that the verdict was in fact rendered in pursuance of a stipulation entered into at the time of the trial, whereby it was agreed between the parties that the remaining property should not be assessed, and that the jury should find the damages to such remaining property in a nominal sum, for the express purpose of rendering such remaining property nonassessable. This proof seems to have been offered for the purpose of showing that whatever consent had been given by the school district that its property should be assessable for this improvement, in the original petition therefor addressed to the city council, was abrogated by common consent by this stipulation entered into at the time of the trial. So that the offered proof of this stipulation was, after all, only an offer to prove that there was, at the time of the condemnation trial and judgment, no existing stipulation between the parties, either sub-

mitting that question to the court for decision, or consenting that the court should adjudicate that the property should be assessable. The trial court excluded this offered proof, as in the *Michaelson* case, evidently upon the theory that, because of the manner in which the issues were presented by the pleadings, the burden of proving such fact was upon the city. The city offered no proof that that question was submitted to the trial court for decision in the condemnation judgment, nor did it offer any proof that the school district consented to the court making such adjudication in the condemnation judgment. Notwithstanding the exclusion of respondent's offer of proof, and the entire absence of proof as to how the court acquired jurisdiction in the condemnation case to make that adjudication, the learned trial court in this case granted the relief prayed for by the school district, evidently upon the theory that the adjudication in the condemnation judgment that the property should be assessable was void upon its face, in view of the verdict of the jury finding that the remaining property was damaged. This we think was erroneous, for the same reasons we have stated in the *Michaelson* case; though, for the reasons there stated, had respondents' offered proof been received, it might have been ample to show that the court made such adjudication without jurisdiction, thus rendering it void.

Counsel for the city introduced in evidence in this case the original property owners' petition addressed to the city council asking for the institution of the condemnation proceedings and the making of the improvement. We do not find this petition in the statement of facts as an exhibit, but assume that the purported copy thereof set out in the city's answer is a true copy. Counsel for both the city and the school district proceed upon the theory in their argument that this petition was signed by the proper officers of the school district, with other property owners, though we are not able to otherwise determine such fact from this record. It ap-

pears by the copy before us that the petition contained the following:

"And your petitioners do hereby severally agree, and do hereby bind themselves to pay their just and proportionate part of the cost of improving each sub-district as hereinabove provided for, irrespective of any award of damages that may be made in favor of any individual property owner in the condemnation proceeding herein petitioned for."

Counsel for the school district objected to the introduction of this petition, and argues that the signing of such petition by the officers of the school district, in so far as the above quoted provision therein waiving the right to object to the assessment is concerned, is *ultra vires* and not binding upon the district. We are not cited to any authority in support of this contention, and are unable to see why such an act is not within the power of the proper officers of the district. School property is not exempt from the power of eminent domain here involved (Laws of 1905, p. 84); our attention has not been called to any statute exempting school property from special assessment for the improvement of streets adjacent thereto; and it would seem that the proper officers of the school district could make contracts and concessions looking to the improvement of such streets and the assessing of the school property therefor. We think the petition was not erroneously admitted in evidence, so far as the power of the officers of the school district is concerned. We also think it is clear that the language of the petition above quoted amounts to a waiver on the part of the school district to object to the assessment of its property to pay a proper proportion of the cost of the improvement, irrespective of any award of damages that might be made in its favor in the condemnation proceedings, and if it was in no manner abrogated by some subsequent agreement between the school district and the city, it would be sufficient to warrant the levy of an assessment, regardless of the finding of damages, and regardless of whether or not the court had juris-

diction to make the adjudication in its condemnation judgment that the property should be assessable.

The city is apparently relying upon two grounds of estoppel against the school district to support the assessment: (1) The adjudication in the condemnation judgment; and (2) the waiver in the original petition asking for the improvement, independent of such adjudication. As the record in this case now stands, the city made a *prima facie* case upon both grounds. The adjudication, we have seen, carries with it the presumption of jurisdiction, and hence its validity; while the agreement to an assessment in the original petition not being shown to have been in any manner abrogated, was of itself sufficient *prima facie* to support the assessment. The error of the learned trial court in this case consisted of the exclusion of the offered evidence of the school district to overcome the city's *prima facie* case made upon both grounds.

All other questions involved on this appeal we think are disposed of by what has been said in the *Michaelson* case. The decree of the learned trial court, except in so far as it corrects the description of the land appropriated, which is a question not here involved, is set aside, with direction to permit respondents to introduce their proof as offered, and for further proceedings not inconsistent with this opinion.

For the reasons stated in the *Michaelson* case, the respondents will recover their costs from the city upon this appeal.

GOSE, FULLERTON, and MOUNT, JJ., concur.

[No. 9278. Department One. April 21, 1911.]

NORTH COAST RAILROAD COMPANY, *Respondent*, v. KRAFT COMPANY, *Appellant*.[1]

EMINENT DOMAIN—DAMAGES—LEASEHOLDS—RENEWALS—VALUE—DETERMINATION—TERMS OF LEASE—ARBITRATION. Where a lease provided for a renewal for five years at a rental to be agreed upon or fixed by arbitrators, at the option of the lessee, and the fee was acquired by a public service corporation, which refused to consent to an extension for longer than eighteen months, and refused at all times to agree upon the rental or arbitrate the matter, but commenced a condemnation suit to appropriate the leasehold, the court cannot, eleven months after expiration of the original term, require an arbitration at that time within one day pending a stay of the trial, and in default thereof, take evidence and fix the value of the rental, in disregard of the method prescribed in the lease, the lease contemplating an adjustment of the rent before the expiration of the original term.

SAME. In such case, the rights of the tenant in the condemnation suit can only be protected by adhering to the view that the rent reserved in the lease continued for the renewal term, especially in view of the fact that the relator's agent demanded and collected one month's rent at such rate, and the lessee tendered the same each month, while the relator at all times refused to comply with the terms of the lease requiring it to agree upon or arbitrate the matter of the rent.

SAME—VALUE OF LEASEHOLD—EXPENSE OF REMOVAL — EVIDENCE. In proceedings to condemn a leasehold, while the lessee's expense of moving to a new place and damage to stock and fixtures therefrom is not recoverable as specific items apart from the leasehold, evidence thereof is admissible as showing the value of the unexpired term.

SAME—RESTRICTIONS IN LEASE. In proceedings to condemn a leasehold, the rental value of the unexpired term cannot be measured by "the highest and best use" of the premises, where the lease restricts its use to a specified business.

SAME—MEASURE OF DAMAGES TO A LEASEHOLD. In proceedings to condemn a leasehold, the measure of damages is the difference between the rent reserved and the rental value during the remainder of the term, plus loss of profits while moving to a new location.

[1]Reported in 115 Pac. 97.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 17, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, establishing the value of a leasehold interest in real property, in proceedings to condemn land for railroad purposes. Reversed.

Post, Avery & Higgins, for appellant.

Danson & Williams and *Hamblen & Gilbert*, for respondent.

Gose, J.—This is an appeal from a judgment establishing the value of a leasehold interest in real property, entered at the suit of the respondent, a public service corporation. The appellant, defendant below, is a corporation engaged in the wholesale and retail harness, saddlery, and manufacturing business. In November, 1903, the Northwestern & Pacific Hypotheekbank leased to the appellant a brick building in the city of Spokane, for the term of five years, beginning January 1, 1904, and ending on the 31st day of December, 1908, at a monthly rental of $175 per month, payable monthly and in advance upon the 1st day of each month during the term. The lease contained the following provision:

"*Provided, however*, That the said lessee, its successors and assigns, shall have the privilege of renewing said lease for the term of five years from the expiration thereof upon giving written notice at least ninety (90) days before the said expiration, that they desire so to do, at such rental as may be mutually agreed upon by the parties hereto, their successors or assigns, and in case they are unable to agree upon the rental to be paid, then the amount of said rental shall be fixed by arbitrators. The method of which said arbitration shall be as follows: One arbitrator shall be chosen by each of the two said parties hereto, and if the two persons so chosen shall be unable to agree, then a third person shall be chosen by each of the two said arbitrators, and the decision of the majority of the three arbitrators shall be binding upon the parties hereto."

It is further provided, that the lessors may reenter and repossess themselves of the premises if the rent is not paid on the day stipulated in the lease or for default in any of the covenants; that the lessee shall not assign the lease or sublet the premises without first having obtained the written consent of the lessor; that the lessee will not make, or suffer to be made, any change or alteration in the leased premises, either external or internal, without first obtaining the written consent of the owner; that it will not allow the same to be used for any illegal or immoral purposes, but that it "will use the same as a wholesale, retail, and manufacturing harness and saddlery or similar business." On the 22d day of October, 1907, the respondent obtained a contract for the purchase of the leased premises, and acquired the fee on April 20, 1909. On the 24th day of September, 1908, the appellant gave notice to the respondent that it exercised its privilege to renew the lease, conformably to the stipulation, for the period of five years from and after December 31, 1908, and that it

"Begs to advise you, and each of you, that it will undertake to make an agreement with that party who is successor in interest of the lessor, or who by virtue of any contract with the owner of the fee simple title to said property, has the right and power so to do, as to the rentals to be paid by the undersigned, and that upon failure so to do, that the undersigned will promptly name an arbitrator for the purpose of undertaking to fix the amount of such rental, as in the lease provided. The undersigned requests to be promptly notified of the name of the person or corporation who has the right, power and authority to agree upon the amount of such rental, and in case of failure so to agree, to name an arbitrator for and on behalf of the lessor. The undersigned further begs to advise you that its representative will meet the person who has the right, power and authority to agree upon the rental on behalf of the lessor, or the representative of such person or corporation, at any time and place to be named by them, for the purpose of undertaking to mutually agree upon the amount of such rentals."

The respondent disregarded the notice until after the expiration of the original term, and until after January 8,

1909. On January 25, 1909, the respondent, through its attorneys, addressed the following letter to appellant:

"January 25, 1909.

"To the A. A. Kraft Company,
"Spokane, Washington.

"Gentlemen: As heretofore stated to you orally the undersigned, The North Coast Railroad Company, is the owner of lot 1 and part of lot 2 in block 3 of Resurvey and Addition to Spokane Falls (now Spokane), and of the building situate thereon, it having purchased same for railroad purposes. On account of its needing said property for railroad purposes it cannot renew the lease, which you heretofore held and which expired on December 31st, 1908, for a longer period than eighteen months from January 1, 1909. It is willing to renew said lease for said time and to allow you to occupy said premises at a reasonable rental, said rental to be agreed upon between it and your company, and in case you cannot agree it will appoint an arbitrator, as provided in said lease, who, with such arbitrator as you shall name, shall find the reasonable rental value of said premises for said period as provided in said lease. This will give you ample time to secure another location and building for your use."

In response to this letter, the appellant advised the respondent, in writing, to conduct its negotiations with its attorneys, Messrs. Post, Avery & Higgins. This action was commenced in April, 1909. The order of necessity having been entered, the trial of the question of the value of the leasehold interest commenced on November 29, 1909. The rental value for the renewal period of five years had not then been fixed by any of the methods agreed upon in the lease, although eleven months had lapsed since the expiration of the original term. On January 2, 1909, the appellant paid to the agent of the respondent, who had theretofore collected the rent, the sum of $175. This check was cashed by the agent, and its check for the same amount was sent to appellant on January 8. The appellant returned the check, and thereafter tendered to the respondent $175 on the first of each month.

Before writing the letter of January 25, there was some conversation about the rent between the respondent's attorneys and the appellant, and between the former and the attorneys for the latter. The respondent, however, took the position in each of the conversations, as it did in its letter, that it would not participate in fixing the rent for a renewal term longer than eighteen months from January 1, 1909. The appellant stated that it considered that the payment of the rent on January 1, 1909, fixed the rental value of the premises at $175 per month for the renewal term, but expresly directed the respondent to take the matter up with its attorney as it did not care to talk about it. Pending the trial, the respondent's attorney moved for a stay of proceedings, until "appraisers could be appointed and the rental value determined by them." In passing upon the motion, the court stated that he was "inclined to grant a stay for a very short time so that the trial can proceed tomorrow, with a view that the parties agree upon arbitrators to fix the rental value, if they cannot agree among themselves." The attorney for the respondent then stated that he would name an arbitrator "at once; by morning, if not sooner." Thereupon the appellant's attorney inquired: "Your Honor will grant a stay until tomorrow morning?" and the court replied: "I think not longer than the afternoon, so as to proceed at that time." The attorney for the appellant then stated that he did not think that he was required to state in open court at that time whether he would name an arbitrator. The court then adjourned for the day. Upon convening of court the next day, the appellant's attorney stated

"That his understanding of plaintiff's motion and the court's ruling was that arbitrators should be appointed at this time to determine the amount of rent to be placed in the lease as though the arbitrators had met before January 1st, 1909, and for the purposes of this law suit only, and not with the intent of allowing defendant to remain in possession for the period of five years, as provided in the lease, and as the fact was that the failure to appoint arbitrators was

wholly the fault of plaintiff and plaintiff's attitude clearly indicates that it did not desire arbitration but was satisfied with the old rent and had accepted the same, that he believed that it was improper for the court to ask defendant to now arbitrate this question for the purposes of this law suit and stay proceedings for that purpose, and defendant would decline to name an arbitrator at this time."

The respondent made no reply, and the trial proceeded. The respondent, in moving for a stay and in its offer in open court to name an arbitrator, did not state whether it adhered to its former policy of fixing the rent for eighteen months only or for five years. It is apparent, from the remarks of the appellant's counsel, that his understanding was that the offer to arbitrate did not contemplate the fixing of the rent for five years. If he misconstrued the motion, it was the respondent's duty to so advise him. It did not do so. The court then, over the objections of appellant, proceeded to, and did, hear the testimony of witnesses as to the rental value of the property for the renewal term. It is apparent that, after a delay of eleven months and the respondent's refusal to meet the appellant's demand for the appointment of arbitrators to fix the rent for the renewal period, it could not require the appellant to proceed with such haste in the naming of an arbitrator and in having the question of rental value passed upon by them. The time allowed by the court was not sufficient. A reference to the provisions of the lease makes it clear that it contemplates an adjustment of the rent for the new term before the expiration of the original one. This is made apparent by the clause authorizing a reentry for a failure to pay the monthly rent in advance. At the close of the case, the court found the facts as follows:

"(1) That the fair rental value of the premises occupied by the A. A. Kraft Company for the term of five years commencing January 1, 1909, was $375 per month.

"(2) That the fair rental value for the remainder of the term from this date is $425 per month.

"(3) That the loss of profits during the time required

by said The A. A. Kraft Company to remove to another location is the sum of $80.

"(4) That the damages which said The A. A. Kraft Company is entitled to recover of and from said petitioner in this condemnation proceeding is the difference between the rental value of said premises per month on January 1, 1909, and on the date of the trial, November 29, 1909, or $50 a month for the unexpired term of 47 months being the sum of $2,350, and the loss of profits during the time of removal, or $80, making a total of $2,430."

and entered a judgment in accordance with the findings.

The appellant contended at the trial, and contends here, that the refusal of the respondent to fix the rent for the renewal term in accordance with the provisions of the lease and its notice, and the acceptance of the rent on January 2, 1909, at the rate agreed upon in the original lease, fixed the rental which it was required to pay for the renewal term. The respondent's position is that, in view of all the facts stated, it was competent for the court to fix the rental value of the property upon opinion evidence submitted for that purpose. The evidence does not show any express direction to the agent to collect the rent on January 1, 1909. Nor does it show that it had been directed not to collect it as it had theretofore done. The fact that it went to the appellant's place of business and demanded and received the rent is a circumstance to be considered in connection with the respondent's delay in meeting the appellant's demand of September 24 for an adjustment of the rent for the new term. These facts and the old lease were the only competent evidence before the court of the rental value of the property for the five-year term beginning January 1, 1909. The lease provides the manner and form of fixing the rent. The respondent at all times refused to meet the request of the appellant for an adjustment conformably to the lease. It acquired the property subject to the lease, and it was its duty to proceed in accordance with its terms. The fact that it desired to devote the property to a public use within the five years does not

change the rule or dispense with its duty in the premises. The renewal of the lease would not prevent the appropriation of the property to a public use. 2 Lewis, Eminent Domain (3d ed.), §§ 414-416. This rule is based upon the principle that the appropriation of the property of another to a public use is an exercise of sovereignty which cannot be relinquished by contract. The respondent at all times refused to agree upon the rent, or to name an arbitrator to fix it for a longer term than eighteen months. In other words, it proceeded to appropriate the property in utter disregard of the contract. If it had made a *bona fide* effort to comply with the contract, and had named an arbitrator, and the arbitration had been fruitless, or if the failure to arbitrate had been due to the refusal of the appellant to meet it upon the terms of the lease, then the power of the court to determine the rent at its suit, upon opinion evidence, could not be questioned. The rule in such cases rests upon the principle that the court will determine the facts at the suit of the innocent party, upon the best evidence obtainable; but the court cannot disregard the contract in a suit by the wrongdoer, and make for the parties a contract materially different from the one they made for themselves. These views have abundant support in the adjudged cases.

In *Sherman v. Cobb*, 16 R. I. 82, 12 Atl. 232, it was held that, where a lease provides that upon its renewal the rent for the extended term shall be fixed by appraisers, the landlord cannot maintain an action for the recovery of the reasonable rental value until he has exhausted the methods provided in the contract. Where a contract provides for a method of adjusting all differences that may arise between the parties, that method must be pursued before either party can resort to the courts for an adjustment. *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374; *Hughes v. Bravinder*, 9 Wash. 595, 38 Pac. 209; *Lidgerwood Park Water Works Co. v. Spokane*, 19 Wash.

365, 53 Pac. 352. In *Ryder v. Jenny*, 2 Rob. (N. Y. Sup'r Ct.), 56, a lease with covenants for renewal expired on the 25th day of April, 1856. The lease provided that the landlord would execute a renewal of the lease for the term of twenty-one years, "at such annual rental as should be agreed upon by the parties;" and provided for a mode of appraisement in the event that they could not agree upon the rent. The tenant continued in possession until February, 1861, without paying any rent, before asking for a renewal of the lease. On January 30, 1862, an appraisement was made by appraisers chosen by the parties conformably to the lease, and on July 21 following, a lease was tendered. The rent under the old lease was $100 per year. The appraisers fixed the rental value at $140 per year. Upon these facts it was held that, until the rent was determined and a lease tendered, the tenant was only liable for the amount of rent previously paid, and that "the lease was not tendered until July, 1862, and the increased rent only became payable at that time."

The respondent relies upon the following authorities: *Hegan Mantel Co. v. Wood*, 22 Ky. Law 427, 57 S. W. 929, 17 Am. Dec. 159; *Wright v. Hardy*, 76 Miss. 524, 24 South. 697; *Andrews v. Marshall Creamery Co.*, 118 Iowa 595, 92 N. W. 706, 96 Am. St. 412, 60 L. R. A. 399; 24 Cyc. 1008; *Kaufmann v. Liggett*, 209 Pa. St. 87, 58 Atl. 129, 103 Am. St. 988, 67 L. R. A. 353; Jones, Landlord and Tenant, § 346; *Uhrig v. Williamsburg City Fire Ins. Co.*, 101 N. Y. 362, 4 N. E. 745; *Lowe v. Brown*, 22 Ohio St. 463, and *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304.

They do not support its contention. The *Wood* case announces the rule that a reasonable delay in the appraisement does not debar either party from thereafter having the property appraised according to the lease. In the *Wright* case, there was a stipulation for the selection of appraisers who should fix the rental value of the property in the event of a disagreement between the parties. The lease further pro-

vided, "that should either party fail or refuse to make an appraisement, or to select a referee to appraise said lots, the other party may cause said lots to be appraised by three disinterested freeholders to be selected by said party." There had been no appraisement prior to the commencement of the action. It was held that, "The right to a revaluation has not been forfeited or waived by its not having been made or insisted upon earlier," and that a court of chancery may fix the valuation. It does not appear from the opinion which party was in default. However, under the clause in the lease which we have quoted, the parties were equally at fault, as the power was ample in either to have the appraisement made. The *Andrews* case holds that, where the tenant has affirmatively indicated his election to renew, he has done all that is necessary to create a renewal. The same rule is stated in 24 Cyc. 1008, and it is further said that, "while the execution of the lease is not necessary, . . . it may nevertheless be required by either of the parties after the election has been exercised." The *Kaufmann* case is an instructive one. There the lease provided that the lessees should have the privilege of a renewal. It also provided that the rental, in event the lessees elected to renew, should be fixed by arbitrators selected in a specified way; also that, if the arbitrators and umpire failed to agree within a fixed time, then others should be chosen in the same manner. There was no provision in the lease covering the contingency of the failure of the second set of arbitrators to agree. The lessees exercised their privilege of renewal, and gave the stipulated notice. Both sets of arbitrators failed to agree. The landlords then gave notice to the lessees to surrender possession of the premises. Thereupon the lessees filed a bill in equity, praying that the court determine the amount of rental to be paid under the renewal. The court said:

"But that in cases of renewal leases, the weight of authority clearly favors the view that the tenant in such a case has a quasi proprietorship; a right, lacking merely a valua-

tion; and that the grossest inequity would be worked, should he lose his right through a failure upon the part of the arbitrators to fix a valuation. While, therefore, a court of equity will not undertake to compel an arbitration, which it cannot control, it will in such case make an appraisement itself, or direct it to be done by its own officer, and will thereafter enforce specific performance of the contract, upon the terms so found."

"In case the rent under a lease is to be fixed by appraisal, then, if the referees appointed under the contract or lease to make the appraisal are unable to make it, the lessor will be entitled to sue for a reasonable rent. This right to sue depends upon a condition precedent, namely, his having tried to get the rent fixed in pursuance of the terms of the lease, and failing to do so." Jones, Landlord and Tenant, § 346.

In the *Uhrig* case, the court said:

"Under the arbitration clause, it was the duty of each party to act in good faith to accomplish the appraisement in the way provided in the policy, and if either party acted in bad faith so as to defeat the real object of the clause, it absolved the other party from compliance therewith; and if either party refused to go on with the arbitration, or to complete it, or to procure the appointment of an umpire so that there could be an agreement upon an appraisal, the other party was absolved."

The *Lowe* and *Grosvenor* cases announce the rule we have stated, viz., that when the arbitrators have failed to agree, or when one party refuses to proceed in conformity with the contract, the court, at the instance of the innocent party, will determine the question of value. We do not deem it necessary to follow counsel for the respondent in the discussion of the technical differences in meaning between the words "renew" and "extend." The appellant gave the requisite notice, and its right to hold for the extended term thereby became fixed. The only matter left for determination was the appraisement of the rental value of the property. We think that the respondent's attitude upon that question has been such that the rights of the appellant can only be protected by

adhering to the view that the rent provided in the lease continued for the renewal term. Aside from the lease and the circumstances of the collection of the rent and the delay of the respondent, there was no competent evidence before the court upon the question of the rental value of the property on January 1, 1909.

Evidence was admitted, over the objection of the respondent, showing the expense of moving the machinery, stock, and fixtures to a new place of business, the damages to the same resulting from the removal, and the value of the fixtures lost because not removable. These items were not allowed as specific or independent damages. The refusal to allow them is assigned as error. 2 Lewis on Eminent Domain (3d ed.), § 728, says:

"But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid."

A large number of cases are cited as supporting the text. In *Pause v. Atlanta*, 98 Ga. 92, 26 S. E. 489, the rule announced by Mr. Lewis was applied to the owner of a leasehold in real estate. The court said:

"The measure of her damages is the injury to her property which is injuriously affected by the public improvement. In arriving at that damage, neither the profits of the business conducted on the premises, nor the cost to the tenant of fixtures and improvements placed therein, nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in the value of fixtures, improvements, or articles such as are removed by the lessee, can be recovered as damages, but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate."

"Injury to business, loss of profits, inconvenience to the owner, damages to personal property or the expense of removing it, are not to be estimated as distinct elements of

damages." *St. Louis, K. & N. W. R. Co. v. Knapp-Stout & Co.*, 160 Mo. 396, 61 S. W. 800.

See, also, *Cook & Rathborne Co. v. Sanitary Dist. of Chicago*, 177 Ill. 599, 52 N. E. 870.

We think the evidence was admissible, not as a basis for a specific claim, but as showing the value of the unexpired term. *Schuykill River E. S. R. Co. v. Kersey* (Pa.), 19 Atl. 553; *Braun v. Metropolitan West Side El. R. Co.*, 166 Ill. 434, 46 N. E. 974; *McMillin Printing Co. v. Pittsburg etc. R. Co.*, 216 Pa. St. 504, 65 Atl. 1091; *Metropolitan West Side El. R. Co. v. Siegel*, 161 Ill. 638, 44 N. E. 276. The appellant relies upon the following cases: *Patterson v. Boston*, 23 Pick. 425; *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; *Commissioners of Parks and Boulevards v. Moesta*, 91 Mich. 149, 51 N. W. 903; *Grand Rapids etc. R. Co. v. Weiden*, 69 Mich. 572, 37 N. W. 872; *Philadelphia & R. R. Co. v. Getz*, 113 Pa. St. 214, 6 Atl. 356. These cases support the contention that such losses are recoverable. "Damages" in law, means an adequate compensation for the loss suffered or the injury sustained. The rule itself is well settled and simple of statement, but its application is often attended with difficulty, on account of the great diversity of circumstances surrounding different cases where the principle is sought to be applied. As was said in *Seattle & M. R. Co. v. Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503:

"It is difficult, if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage, as the equities of the parties must more or less depend upon the particular facts and circumstances of each case."

This is particularly true as applied to a leasehold which may have no market value in excess of the rent reserved. The appellant is entitled to be paid the value of the unexpired term. The items under consideration are but constituent elements of that value. In principle, and according to what we consider the better authority, they are not recoverable as

something apart from the leasehold interest. They form an essential part of its value. There is a material conflict in the evidence offered by the respective parties. The court could have found the rental for the remainder of the term either more or less than $425 per month, and the finding would have had abundant support in the evidence. The court saw the witnesses in action and viewed the premises, and we are not disposed to disturb the finding as to rental value for the unexpired term.

The appellant's contention that evidence should have been admitted as to the rental value of the unexpired term, measured by "the highest and best use" of the premises, cannot be sustained. It is correct as a general principle. The lease, however, limits the appellant's use to "wholesale, retail, and manufacturing harness and saddlery or similar business." It further prohibits the use of the premises for certain specific purposes. The question for the court to determine, and the one which it did determine, was the value of the leasehold for the unexpired term, in view of the restrictive clause in the lease.

Error is assigned in the admission and exclusion of certain testimony respecting adjoining property owned by the respondent and the use to which it would be devoted. The court gave both parties wide latitude in presenting the facts tending to show the value of the leasehold. The case was tried to the court, and as we have said, the finding as to the value of the unexpired term is supported by competent evidence.

The judgment is reversed, with directions to enter a judgment in favor of appellant for a sum equal to the difference between $175 and $425 per month for the remainder of the term, plus the $80, loss of profits.

Dunbar, C. J., Parker, and Mount, JJ., concur.

[No. 9092. Department Two. April 22, 1911.]

NATIONAL GROCERY COMPANY, *Respondent* v. D. W. SIMMONS, *Appellant*.[1]

PARTNERSHIP—HOLDING OUT AS PARTNER—EVIDENCE—SUFFICIENCY. Findings to the effect that defendant was liable for the debt of a copartnership are sustained, where it appears that he was at one time a member of the firm, invested money therein, and held himself out as such to the plaintiff, that no formal dissolution was announced, and that, three years after he claims to have retired from the firm, he signed a writing agreeing to give his services to the firm for one year or employ a man to take his place, and signed the firm name to a note in payment of firm obligations, and indorsed another note for a partnership debt.

COSTS—ON APPEAL—ALLOWANCE. Upon the reduction of an excessive judgment entered through the error of respondent, appellant will be allowed the costs on appeal.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 5, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Murphy & Winders, for appellant.

Ira Bronson, for respondent.

PER CURIAM.—This action was commenced by the National Grocery Company, a corporation, against Richard Irvine, R. G. Leslie, and D. W. Simmons, copartners as Irvine, Leslie & Company, and Nellie E. Simmons, wife of D. W. Simmons, to recover for merchandise sold. From a judgment in plaintiff's favor, the defendant D. W. Simmons has appealed.

The issue tried was whether D. W. Simmons was a member of the alleged copartnership or had held himself out to the respondent as such, and whether any judgment obtained against him was the community debt of himself and wife. The trial judge found that, for a long time prior to May 24, 1907,

[1]Reported in 115 Pac. 306.

D. W. Simmons held himself out to the respondent as a partner of Richard Irvine in the mercantile business of Irvine, Leslie & Company, in Alaska, and that he continued such representation until September 13, 1907; that respondent, at the special instance and request of appellant and Richard Irvine, sold goods to Irvine, Leslie & Company, of the value of $10,347.07, upon which they paid $1,948.80, leaving $8,398.27 unpaid; that respondent in selling the goods relied solely and wholly upon appellant's representations; and that at no time did D. W. Simmons announce to respondent his withdrawal from such partnership relation. Upon these findings, a separate judgment for $8,398.27, interest and costs, was entered against Richard Irvine and D. W. Simmons. No community judgment was entered against Nellie E. Simmons.

The appellant contends the trial court erred in the findings made. Although respondent alleged appellant was a member of the firm of Irvine, Leslie & Company, no finding was made that he was a partner when respondent sold the goods. Appellant contends the court impliedly found he was not a partner, and argues that, if he is liable at all, it can only be on the theory of estoppel, but that the evidence shows no liability on that ground. He concedes that, during the year 1903, he was a member of the firm of Irvine, Leslie & Company, but insists that he withdrew before respondent sold it any merchandise, that he has not been a member since, and that he at no time since represented himself as one of the firm. It is immaterial for the purposes of this appeal whether appellant was a partner after the year 1903, or whether the trial court so found, as a careful examination of the evidence convinces us that the findings as to representations made by him must be sustained, and that no findings more favorable to appellant could have been made. We will not enter upon a discussion of the conflicting evidence, as no good purpose would be thereby served. It is not disputed that a partnership did at one time exist, of which appellant was a member;

that he invested money therein; that no formal dissolution was ever announced; and that he signed a written instrument by which he agreed to give his personal services to the firm from June 1, 1906, to October 1, 1906, or employ a man to take his place. Appellant admits his signature to this document, but fails to explain how he came to execute it. It is also conceded that appellant, on October 16, 1906, signed the firm name to its promissory note to an Alaska bank for $7,000, to secure funds for the payment of firm obligations, and that he later endorsed a $10,000 note to respondent for a partnership debt. These and other circumstances considered, with oral evidence of witnesses produced by respondent, are sufficient to sustain the findings made, which in turn support a judgment in respondent's favor.

The trial judge announced his opinion some time after the hearing. In the meantime, further payments were made upon the respondent's claim from partnership assets. Appellant now calls attention to the fact that the final judgment was in excess of the amount due at the date of its entry. Respondent admits this error, and expresses its willingness to correct the same.

The judgment will be affirmed, but with permission to appellant to apply to the trial court for an order reducing it to the amount actually due at the date of its entry. Because of the error of respondent in taking an excessive judgment, the appellant will recover costs on this appeal.

[No. 9201. Department One. April 24, 1911.]

CHARLES H. POTTER *et ux.*, *Respondents*, v. THE CITY OF SPOKANE, *Appellant*, WAREHOUSE & REALTY COMPANY *et al.*, *Respondents*.[1]

APPEAL—REVIEW—PLEADINGS—AMENDMENT TO CONFORM TO PROOF. A somewhat indefinite complaint for damages to property, by reason of the negligent construction of a fill in a street, will be deemed amended on appeal to conform to proof, admitted without objection, that the injury resulted from defective plans of the city, rather than defective workmanship.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—INJURY TO PROPERTY—DEFECTIVE PLANS. Where property was damaged by the collapse of a fill because of defective plans, the city cannot evade liability by the fact that the work was done by independent contractors.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 16, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for damages and for an injunction. Affirmed.

Fred B. Morrill, *R. L. McWilliams*, and *V. T. Tustin*, for appellant.

Samuel R. Stern, for respondents Potter.

Cullen & Dudley and *Happy, Winfree & Hindman*, for respondent Warehouse & Realty Company.

Post, Avery & Higgins, for respondents Huetter *et al.*

FULLERTON, J.—On August 24, 1908, the city of Spokane entered into a contract with the Warehouse & Realty Company, a corporation, by the terms of which the company agreed to construct for the city a dry stone fill across a certain depression in East Sprague avenue, a public street of the city of Spokane. The contract provided that the work should be performed according to certain plans and specifi-

[1]Reported in 115 Pac. 176.

cations described in the contract, and should be under the supervision, direction and control of the board of public works of the city, and its representative, the city engineer; and that, in case of improper construction and noncompliance with the contract, the board had the right to order a partial or entire reconstruction of the work, or to declare the contract forfeited and relet the same to another contractor, and to adjust the differences that should arise between the city and the contractor by reason of the change. Thereafter the Warehouse & Realty Company, with the consent of the city, sublet the contract to one John T. Huetter and one Joseph Zirngibl. The subcontractors entered upon the performance of the work and proceeded therewith until the greater part of the fill was completed. A part of the fill was immediately in front of the property of the respondents, Charles H. Potter and Nellie F. Potter, on which there had been erected a flour mill. The fill at this point spread or bulged out onto the respondents' property, came in contact with the flour mill, and pushed it from its foundations, and otherwise substantially injured the building.

The respondents named above thereupon began this action to have so much of the fill as protruded upon their property abated as a nuisance, and to recover damages for the injury caused to their property by the encroachment of the fill thereon. To the action, both contracting firms as well as the city were made defendants. The negligent acts complained of were set forth in the complaint in the following language:

"That the said defendants disregarding the location of the said south line of Sprague avenue, have erected and have each permitted to be erected an immense fill and improvement of the said Sprague avenue, by laying immense bowlders and rocks and stone constituting said fill and improvement in such a careless and negligent manner as to permit the same to encroach upon the property of the said plaintiffs Potter and wife and occupied by them and their co-plaintiffs, and have so negligently and carelessly permitted said improve-

ment to be made and said stone to be laid as to permit the tremendous weight of said stone and bowlders to lean over and against the said milling property, and thereby create a nuisance and a menace to the safety of said property and making it impossible to carry on the business for which said property was intended."

The defendants answered separately. The answer of Huetter & Zirngibl was in effect a general denial. The answer of the city was a general denial and an affirmative plea to the effect that the Warehouse & Realty Company was an independent contractor, and that the city was not liable for any damage that may have occurred by reason of the negligent performance of the work. The Warehouse & Realty Company answered, seeking to throw the blame for defective work, if any there was, on the subcontractors. Replies were filed putting in issue the affirmative matters in the answer, and a trial was had before the court sitting without a jury. The trial resulted in a judgment in favor of the respondents for damages against the city in the sum of $1,000, and an order requiring the fill to be removed from the respondents' property as a nuisance. No recovery was allowed against the other defendants or either of them. The city appeals.

On the trial of the cause, the respondents introduced, without objection, evidence tending to show that the plan on which the fill was made was faulty, that no matter how careful the manner in which the work was performed, or how closely the plans were followed, the fill would not stand in place, because construction according to the plans did not furnish sufficient cross-binding to hold it. The case was tried chiefly upon this issue, there being little or no evidence on the affirmative of the proposition that the fill collapsed because of defective workmanship; in fact, it was shown that the work was done under the immediate supervision of the city's engineer and inspectors, and the completed portions of the work accepted by them from time to time as the work progressed. It was on this evidence that the court based its

judgment that the city alone was liable for the injury to the respondents' property.

The city first complains that there was no issue on the question whether or not the plan of the work was defective, and that the court erred in holding the city liable upon a judgment founded upon that issue. It argues that the respondents based their right of recovery upon defective workmanship, rather than upon defective plans, and that the evidence of the plaintiff should have been confined to the trial of that question. An examination of the allegations alleging negligence above quoted will disclose that it is not very definite on the question here suggested. It pleads results rather than causes, but we think it sufficiently broad to allow evidence upon both these questions of defective plans and defective workmanship. But if this were not so, we do not find that the city objected at any time to the trial of this issue, and this being so, the complaint will in this court be deemed amended so as to frame the issue.

The principal contention is that the city is not liable to answer for the defect because the work was performed by an independent contractor. Whether both or either of the contracting companies were independent contractors we think may be doubted, but assuming that they were, the city is liable to the respondents in any event. The evidence abundantly showed that the bulging out and collapse of the fill was due to a defect in the plans of the work, and not to defective workmanship. In such a case, the person authorizing the work cannot escape liability for injuries incurred thereby by intrusting the work to an independent contractor. *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6.

Other errors are assigned, but because of the views announced on the questions discussed, they have become immaterial.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and PARKER, JJ., concur.

[No. 9248. Department One. April 24, 1911.]

JACK KING, *Appellant*, v. GEORGE P. LISTMAN *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—POLICE OFFICER — REMOVAL — GROUNDS. A sergeant of police, assigned to duty as a captain of a temporary force, resumes his former relation to the regular force upon the expiration of the temporary office of captain, and his refusal to report for duty as a sergeant warrants his dismissal for insubordination.

CERTIORARI—REVIEW OF BOARDS—DISMISSAL OF POLICE OFFICER. A writ of certiorari to review the dismissal of a police officer by the civil service commission is properly quashed where the cause assigned for dismissal was sufficient.

Appeal from an order of the superior court for King county, Gilliam, J., entered April 15, 1910, sustaining an order of the civil service commission confirming the dismissal of a member of a city's police force. Affirmed.

Thos. H. Bain and *Smith & Cole* for appellant.

Scott Calhoun, *H. D. Hughes*, and *C. B. White*, for respondents.

PER CURIAM.—On May 3, 1909, the city of Seattle, by ordinance, provided for a temporary increase in its police department to meet an emergency then existing. The ordinance provided for the appointment of one captain, three sergeants, and thirty-six patrolmen, to serve for a period of five months. One L. J. Stuart was appointed to the temporary captaincy so created, and served until about the middle of August, 1909, when he was made a permanent captain of the police force. On August 20, 1909, the appellant, who was then a sergeant on the regular police force, was appointed to fill the vacancy created by the promotion of Stuart. His appointment was designated in the order as a temporary appointment to fill out an unexpired term of two months and five days.

[1]Reported in 115 Pac. 93.

Before the expiration of term fixed in the original ordinance, the city council, by another ordinance, extended the time of the appointment until January 1, 1910. On December 29, 1909, the chief of police of the city of Seattle ordered the appellant to report for duty as a sergeant, and filed a report with the civil service commission of the city of Seattle notifying that body that he had separated the appellant from his duties as captain, assigning as his reason that the position was not provided for in the 1910 tax levy. On January 7, 1910, the chief of police further notified the commission that he had separated the appellant from further duty in the police department, giving as his reasons "insubordination, refusing to don a sergeant's uniform and perform a sergeant's duty." Later on, pursuant to the rules of the civil service department, the appellant demanded a hearing before that body on the legality of the orders of the chief of police. The hearing was granted, and the appellant was heard in person and by counsel, whereupon, on February 1, 1910, the civil service commission entered an order sustaining and confirming the acts of the chief of police. On March 10, 1910, a writ seeking a review of the order of the civil service commission was granted by the superior court of King county, returnable March 25, 1910, at which time the corporation counsel of the city of Seattle appeared and moved to quash the writ. This motion the court sustained, and this appeal was taken therefrom.

The appellant contends that there was no sufficient legal reason assigned for the order of the chief of police of December 29, 1909, by which he undertook to reduce the appellant from the rank of captain to that of a sergeant of police, and hence the order of the civil service commission is reviewable in the courts, under the authority of *Price v. Seattle*, 39 Wash. 376, 81 Pac. 847. But we think there was a sufficient legal reason. The office of captain, which he was filling, was a temporary creation, and expired by its own limitation upon the day he was ordered to report for duty as a sergeant.

The appellant, by reason thereof, and by operation of the police regulations, resumed his former relations to the police department. He was thus subject to be assigned a duty in his resumed relation, and when he refused to perform that duty could be dealt with for insubordination. The reasons assigned for the removal being legally sufficient, the court will not inquire into the facts. The order appealed from is affirmed.

[No. 9327. Department Two. April 24, 1911.]

JOSEPH MAZZINI SOCIETY, *Respondent*, v. JOHN CORGIAT, *Appellant*.[1]

CONTRACTS—CONSTRUCTION—SUBJECT-MATTER INCLUDED. An agreement to pay all the costs and expenses of the defense of a suit includes the fees of attorneys for services therein, but not the costs and expenses of defending a suit brought by the attorneys to recover their bill.

FRAUDS, STATUTE OF—DEBTS OF ANOTHER—ORIGINAL PROMISE. An agreement by the president of a society to pay all the costs and expenses of the defense of a suit to reinstate a member is an original promise, and not within the statute of frauds, where the society refused to defend and regarded it as a personal controversy between the plaintiff and the defendant.

CHAMPERTY AND MAINTENANCE—CONTRACTS. An agreement by the president of a society to pay all the costs and expenses of the defense of a suit to reinstate a member is not champertous, or void as against public policy, where the president was a party defendant to the suit, and as executive head of the society had a personal interest in the litigation.

COSTS—ON APPEAL. On appellant's obtaining a substantial reduction of the judgment, he will be entitled to costs on appeal.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered September 15, 1910, upon findings in favor of the

[1]Reported in 115 Pac. 93.

plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Modified.

Walter A. Keene and *Faben & Kelleran*, for appellant.

McBurney & Cummings, *H. McC. Billingsley*, and *C. C. Cutler*, for respondent.

PER CURIAM.—The respondent is a fraternal organization, and the appellant was at one time its president. While he was so acting, John Cicoria was expelled from membership in the society, and thereupon commenced mandamus proceedings to obtain reinstatement, making appellant, the society and its secretary defendants. Cicoria was successful in this proceeding, both in the court below and upon the appeal here, the case being reported as *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689. The theory of the present case is that, while the mandamus proceeding was pending in the court below, the society did not wish to incur any expense in its defense other than the sum of $125, which had been originally authorized, regarding it as in the nature of a personal controversy between Cicoria and Corgiat in which the society, or its membership as a whole, was not interested; that Corgiat, in order to induce the society to continue in the defense of the mandamus proceedings, agreed that he personally would pay all cost and expense, and would indemnify the society against any further cost and expense than the sum of $125; that, relying upon this promise of Corgiat, the society permitted him to represent it in the defense in the court below and upon the appeal to this court. The costs and expenses of that proceeding, other than the sum of $125, amounted to the sum of $192.24, in which sum judgment was taken against the society and collected, and a further cost of $24 incurred. Thereafter, the society refusing to pay the attorneys employed in the defense of the mandamus proceedings, they brought suit to recover their attorneys' fees, resulting in a further judgment against the society in the sum of $904.80 which was paid, and an ex-

pense of $225 incurred in the defense of that suit. These several items, aggregating $1,346.04, the society sought to recover from Corgiat upon his agreement made in the original mandamus proceedings, and being successful in the court below, Corgiat appeals.

The findings of the trial court, being made upon contested facts, will not be disturbed, our only inquiry being as to whether the items included by the court in its judgment are correctly chargeable against appellant under his agreement. The agreement, as found by the court, was to pay all costs and expenses of the mandamus proceedings. That was the only action then pending, and the only action either at law or in equity within the contemplation of the parties in which there was any likelihood or probability of legal expenses being incurred. Assuming then, as found by the trial court, that Corgiat bound himself to pay these costs, he could not, under such a promise be held liable for the costs and expenses of the litigation between the society and its attorneys. The fees of the attorneys were earned in the mandamus suit, and hence properly charged against appellant as expense of that litigation; but the item of $225 was not costs of the mandamus suit, nor incurred in any defense of the mandamus suit. It could not, therefore, be charged against appellant upon his promise to pay the costs and expense of that suit.

Appellant raises one law point in contending that Corgiat's promise, if made, was void under the statute of frauds. The promise made, as found by the trial court, was an original promise, and not a collateral undertaking, and hence not within the statute.

It is also contended in this connection that the promise is void as against public policy, and is in fact champertous. It cannot be so held. It was not an officious intermeddling with litigation, actuated either by a spirit of stirring up a controversy or from a desire to share in its probable fruits. Appellant was himself a defendant. He was, in addition, the

president of the society, its executive head, and as such had a personal interest in the litigation which would, as against public policy, support any promise he might make as to its expense.

Finding no error in law and none in fact, save the wrongful charge of $225 against appellant, the judgment is modified so as to exclude the $225 item. Otherwise it will stand, and the cause is remanded with instructions to modify as herein suggested. Costs to respondent.

ON PETITION FOR REHEARING.

[*En Banc.* Decided June 9, 1911.]

PER CURIAM.—Petition for rehearing has been filed in this case, calling attention of the court to the fact that, although appellant prevailed in this court to the extent of obtaining a substantial reduction of the judgment awarded against him by the court below, he was not awarded costs. This was evidently an oversight, and the original opinion and judgment is modified to the extent of awarding costs of this court to the appellant.

[No. 9336. *En Banc.* April 24, 1911.]

C. H. EMMONS *et al.*, *Respondents*, v. CHARLTON & COMPANY, *Appellant*.[1]

NEGLIGENCE—DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show negligence in the maintenance of a stairway in a store, and does not show contributory negligence, where it appears that the stairway was not lighted and was obscured by tables and wares and was not visible to one approaching it until arrival upon it, that the aisle going by it at right angles was crowded with shoppers, and a customer, jostled by the crowd and going straight ahead past the stairway without being able to see it, fell down the stairs when she stepped aside in meeting a person going in the opposite direction.

[1]Reported in 115 Pac. 163.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 2, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for personal injuries sustained by falling down a stairway. Affirmed.

Farrell, Kane & Stratton, for appellant.

Brightman & Tennant, for respondents.

MOUNT, J.—Action for personal injuries. The plaintiffs recovered a judgment for $500, and the defendant has appealed.

It appears that the defendant was conducting a store in the city of Seattle, where the public was invited to enter and purchase goods which were offered for sale. This store was about 118 feet long by 52 feet wide on the main or first floor of the building. About the center of the store, and crosswise thereof, a stairway, eight feet in width, led to the basement. About 12 feet down this stairway there was a landing where a small room was provided for a rest room for patrons. At this landing, the stairway made a right angle and continued on to the basement. The whole floor of the storeroom was occupied by numerous tables upon which wares were displayed. Aisles between these tables extended both lengthwise and crosswise of the room. One of the main aisles extended past the head of the stairway mentioned. A cross-aisle extended to the stairway. An iron bannister or guard, three feet high, extended around three sides of the stairway. Tables had been placed up to these bannisters, which tables contained wares, and on top of these, other small tables were placed, also holding wares; and on the floor beneath these tables, baskets were placed, also containing wares. So that neither the stairway nor the bannisters were visible to persons on the main floor, except perhaps immediately at the head of the stairway. One looking down the aisles lengthwise of the store could not see any indication of a stairway.

On December 14, 1909, at about 3:30 o'clock in the afternoon, the plaintiff Amanda Emmons entered the store for the purpose of purchasing some articles therein. She inquired of a lady working there where she could find the article, and was directed to go down an aisle. The plaintiff had been in the store but once before, and did not know of the stairway or its location. She testified that the store was crowded with shoppers, and that she started to go down the aisle as directed, following the crowd and being jostled by the crowd and by persons going in the opposite direction; that when she came to the stairway, which she did not see and did not know about, going at right angles thereto and straight ahead, she stepped unsuspectingly into the stairway, and fell down to the first landing. She also testified that the stairway was not lighted and was obscured by tables around it. The result was a broken arm and other bruises. A witness for the defendant testified that, while sitting in the rest room across the landing on the stairway, and while she was looking up the stairway, she saw the plaintiff fall, that just before the plaintiff fell, she met a lady going in the opposite direction, and that the plaintiff, in order to let the lady pass, stepped aside, and thereby fell down the stairway. There was some dispute in the evidence as to the extent of the light at the point of the stairway, some of the witnesses saying bright lights were burning all around near and in the rest room, across the landing, on the stairway, and that the curtains at the entrance to the rest room were open. Others testified that the stairway was not lighted, but that it was shaded from the lights in the store by the surrounding tables, and that the stairway was not readily visible. The doctor who was called to attend the plaintiff at the time of her injury experienced some difficulty in finding the stairway after he had been told to "go down stairs," because, he said, "I . . . had to go clear to the stairway before I could see it." He did not remember the condition of the lights.

The defendant relies upon the case of *Dunn v. Kemp &*

Hebert, 36 Wash. 183, 78 Pac. 782. There is much similarity between that case and this. There are these distinctions, however, which seem to be very material. The stairway in the *Dunn* case was an ordinary stairway, protected on both sides by railings and tables next thereto. These things marked the stairway so that from a distance it was visible to one approaching it; while in this case the stairway was obscured by tables and wares, so that it was not visible to one approaching it until arrival upon it. In this case, also, the aisles in the store appear to have been crowded with patrons, which was not unusual; so that the plaintiff was compelled to move along with the crowd, and naturally would not be looking for a stairway in the path of her progress. She testified that she was going straight ahead, following the crowd, when she fell into the stairway, not suspecting there was any stairway on that floor. These distinctions seem to be material, because they show that the stairway in this case was in the nature of an open trapdoor in the line of ordinary travel in the store, rather than an ordinary stairway plainly visible as in the *Dunn* case. It is controlled, therefore, by the reasoning in *Stone v. Smith-Premier Typewriter Co.*, 48 Wash. 204, 93 Pac. 209. The negligence of the defendant consists in so concealing the stairway that a person not acquainted with it would not see it readily upon approaching it.

We are of the opinion that the evidence was sufficient to show negligence of the defendant in the particular above named, and that the plaintiff was not necessarily guilty of contributory negligence. The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, CHADWICK, GOSE, MORRIS, and CROW, JJ., concur.

[No. 9310. *En Banc.* April 24, 1911.]

W. L. O'CONNELL, *Respondent*, v. T. ARAI *et al.*, *Appellants.*[1]

LANDLORD AND TENANT—UNLAWFUL DETAINER—SERVICE OF NOTICE—PROOF—TRIAL—RECEPTION OF EVIDENCE. Judgment for plaintiff in an action for unlawful detainer will not be reversed on the ground that proof of service of the notice was not made and the notice itself not received in evidence, where the case was reopened to supply the proof and plaintiff testified to making the service, and the notice itself was on file; and a ruling that affidavit of service was not necessary in view of plaintiff's testimony and the return of the service of notice, shows that the notice on file was not intended to be excluded.

ACCORD AND SATISFACTION—PART PAYMENT—ACCEPTANCE OF CHECK—EVIDENCE—SUFFICIENCY. Accord and satisfaction of rent, due in the admitted sum of $600, is not shown by the retention of a check for $460, sent to the lessor in satisfaction of the rent, with a claim for a reduction in the rent of $140 on account of street obstructions for ten days, where it was not stated that the check should be returned if the claim was not allowed, and the lessor promptly disallowed the claim and demanded the balance of the rent.

LANDLORD AND TENANT—UNLAWFUL DETAINER—JUDGMENT—DOUBLE RENT. In unlawful detainer, Rem. & Bal. Code, § 827, expressly requires judgment for double the amount of rent due, where no damages are claimed.

LANDLORD AND TENANT—LEASE—STIPULATED DAMAGES—UNLAWFUL DETAINER. A clause in a lease providing for an initial deposit as stipulated damages in case the lessee does not faithfully pay the rent and perform all the covenants and conditions of the lease, refers only to a violation of the contract, and does not relate to the penalty for unlawful detainer, fixed by Rem. & Bal. Code, § 827, at double the amount of rent due.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 5, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for unlawful detainer. Affirmed.

Fred H. Peterson and *Philip D. Macbride*, for appellants.

F. C. Reagan, for respondent.

[1]Reported in 115 Pac. 95.

MOUNT, J.—Action for unlawful detainer. Judgment was entered in favor of the plaintiff as prayed for in his complaint, and defendants have appealed.

It appears that on January 1, 1909, the plaintiff leased lot 4, block 32, Maynard's addition to Seattle, to defendant Arai for a period of three years, at a rental of $785 per month. This property was located within what was known as the Jackson street regrade district, in Seattle, and the written lease provided that the plaintiff should make alterations in the premises so as to conform same to the street regrade when completed. On April 30, 1910, the parties to the lease entered into a written modification of the original. In the modification it was agreed that the plaintiff might have such time as was most convenient to adapt the premises to the regrade, and until that was done the rental was reduced to $600 per month. On June 1, when the rent for that month became due, the attorneys for the defendants wrote a letter to the plaintiff, claiming a further reduction of rent in the sum of $140, because, as stated in the letter, certain stores on the premises were obliged to suspend business for a period of ten days while a temporary walk was being built. This letter closed by saying: "You will find check inclosed for $460 rent for the month of June, 1910, the balance of $140 being retained in satisfaction of the above claim." The plaintiff received this letter and cashed the check for $460, and on June 17, 1910, wrote a letter to the defendant Arai denying his right to make any deduction from the $600 rent due, and notifying him that, unless the $140 was paid by June 20, proceedings would be taken to collect the same. Counsel for the defendants replied to the letter, saying that the acceptance of the $460 check constituted a settlement of the rent. Thereafter on June 20, 1910, the plaintiff caused a notice to be served upon the defendants, notifying them that the rent was due, and to pay the same within three days or quit the premises, and that upon failure to pay or quit they would be guilty of unlawful detainer under the statute.

Defendants refused to pay rent due or to quit. Thereupon this action was brought, setting up the facts, and praying for the amount of rent due to the time of the judgment, that the rent be doubled, and that the lease be declared forfeited.

When the complaint was filed, a bond in the sum of $2,000 was fixed by the court, and a writ of restitution was issued. The defendants thereupon were permitted to give a counter bond in the sum of $4,000, and to retain possession of the premises pending the litigation, which they did. The defendants for answer denied that there was any rent due, and denied that notice had been served as alleged in the complaint, and also set up an affirmative plea of accord and satisfaction. Upon the trial of the case to the court without a jury, the court found the issues in favor of the plaintiff, and that the rent due at the time of the trial amounted to the sum of $3,740. The court thereupon entered a judgment for double the amount of rent due, and for possession of the premises, and declared the lease forfeited. The defendants have appealed from that judgment.

When the plaintiff had rested his case, the defendants moved the court to dismiss the action, upon the ground that there was no proof of the service of notice to pay rent or quit. The court thereupon permitted the plaintiff to reopen his case and supply his proof. His counsel thereupon testified, in substance, that he served the notice upon the defendants, most of them personally. The counsel thereupon offered to file his own affidavit of service which was attached to a copy of the notice, and an objection was made thereto and sustained, the court saying: "His testimony is in. The return of the service of the notice, I think, is all the required legal proof of the service." The court then denied the motion to dismiss, and the notice and affidavit were then filed by the clerk. Defendants now argue that there was no proof of service of the notice, and that the court erred in denying the motion to dismiss. *Lowman v. West*, 8 Wash. 355, 36 Pac. 258, is cited to the effect that, "the tenant has a right to

stand upon the proof of the exact service required by the statute," which is no doubt correct. It is not claimed that such service was not in fact made, but it is argued that the notice itself was not received in evidence. We think the court did not intend to exclude the notice itself. It was in fact filed, and was served; it was sufficient in form and substance, and evidently the court considered it. If it was not received formally in evidence, it clearly should have been, and we shall now consider it so. It would be an idle thing for this court to reverse the judgment and remand the case solely for the purpose of making the proof which now appears in the record.

The defendants also argue that the evidence shows an accord and satisfaction, by reason of the fact that the plaintiff received and credited the defendant Arai with the check for $460. This check was not tendered to the plaintiff conditionally. The amount of rent due was $600. The defendant made a claim that the rent should be reduced $140 on account of a change in the sidewalk. He said in his letter making the claim: "You will find inclosed check for $460 rent for month of June, 1910, the balance of $140 being retained in satisfaction of the above claim." The plaintiff denied the right of defendant to make the deduction, and notified him of that fact and that he must pay the balance; whereupon defendant responded by saying that the acceptance of the check constituted a settlement of the claim. There was no dispute between the parties as to the amount of rent due. This was fixed at $600. The matter of the reduction or offset on account of the sidewalk had not been mentioned by the parties until the defendant sent his check for $460 and asked to be allowed the balance as an offset. The letter did not state that, if the claim was not allowed, the check should be returned. The acceptance of the check under these conditions did not constitute an accord and satisfaction. *Fremont Foundry & Machine Co. v. Norton*, 3 Neb. (Unof.) 804, 92 N. W. 1058.

Defendants also argue that the court erred in entering judgment for double the amount of rent due. The statute expressly provides for this at Rem. & Bal. Code, § 827. In construing this provision of the statute in an action of the same character, we said, in *Hinckley v. Casey*, 45 Wash. 430, 88 Pac. 753:

"The plain reading of the statute is that the court or jury shall assess the damages, and find the amount of rent due, if the action is prosecuted for the nonpayment of rent, and that the court shall thereupon double the amount of the damages and rent. . . . The penalty is not imposed for the nonpayment of rent, as the defendants suggest. If it were, the act could not be sustained on constitutional grounds. The penalty is imposed for the refusal to surrender possession on the termination of the tenancy, whether it be terminated by the terms of the lease for nonpayment of rent, or for any of the other causes specified in the statute. The question is not a new one in this court. Double damages were allowed in *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711; *Quandt v. Smith*, 28 Wash. 664, 69 Pac. 369, and *Bond v. Chapman*, *supra*. Each of these cases was for an unlawful detainer, and in neither case was the tenancy terminated for the nonpayment of rent."

In this case no damages were claimed aside from the rent, and the case falls squarely within the statute.

The lease between the parties contained this provision:

"$785 payable on the execution of this lease as a deposit, that the lessee shall faithfully pay the rent as provided in this agreement, and perform and fulfill all the covenants and conditions of this lease. But in case the said lessee does not pay the rent as provided in this agreement, or does not perform and fulfill the covenants of this lease, then it is mutually agreed that $785 shall be retained by the lessor as liquidated damages."

The defendants contend now that this provision fixed the amount of damages, and that the court therefore erred in awarding a larger sum. It is plain that the provision above quoted refers only to a breach of the contract itself; as, for example, if the plaintiff should quit the premises before the

lease expired, or some other such violation of the terms of the lease, then the damages are fixed by the lease. This provision does not relate to the penalty for unlawful detainer, or an illegal holding over after the lease has terminated. The statute above referred to fixes the penalty in such cases, and this provision does not undertake to waive the provision of the statute in this respect. The court made no finding of damages, and none were adjudged.

We find no error, and the judgment must therefore be affirmed.

DUNBAR, C. J., PARKER, CROW, and GOSE, JJ., concur.

[No. 9348. *En Banc.* April 24, 1911.]

CATHERINE WILCOX SYLVESTER, *Respondent*, v. HARRY OLSON, *Appellant*.[1]

COURTS—RULES — OBSERVANCE — DISCRETION. It is discretionary with the trial court to require the observance of a local rule of court requiring motions to be accompanied by an affidavit that the attorney believed the motion to be meritorious.

NEW TRIAL — GROUNDS — TIME FOR MOTION — EXTENSION—"GOOD CAUSE." The trial court having inherent power to grant a new trial where the evidence is insufficient to sustain the verdict, it will be assumed therefrom that "good cause" was shown for extending the time within which to make a motion therefor.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. Where the evidence is conflicting, the supreme court will not review an order granting a new trial because of insufficiency of the evidence, where there was no clear abuse of discretion.

Appeal from an order of the superior court for King county, Albertson, J., entered October 19, 1910, granting plaintiff a new trial, after the verdict of a jury rendered in favor of the defendant, in an action to recover for the use of real property. Affirmed.

[1]Reported in 115 Pac. 175.

William Wray and *W. R. Bell*, for appellant.

Byers & Byers, for respondent.

CHADWICK, J.—This is an appeal from an order granting a new trial, after a trial before a jury and a verdict in favor of the defendant. He appeals, assigning as error, first, that the court erred in denying appellant's motion to strike the respondent's application for an extension of time in which to serve and file a motion for a new trial. Appellant depends upon a rule of the superior court of King county, whereby it is provided that no motion shall be filed by the clerk unless the same shall be accompanied by the affidavit of the attorney of record that he believes the same to be meritorious and well founded in law. The motion in this case was not so verified.

How far local rules of procedure are to be held binding is a question which has been variously decided by the courts of this country. 18 Ency. Plead. & Prac., 1269. But, generally speaking, it may be said that the observance of such rules lies within the discretion of the trial judge. We now recall but one case in our own reports where this question was considered. It was held, in *Washington Bank of Walla Walla v. Horn*, 24 Wash. 299, 64 Pac. 534, that a rule might "for good reason" be suspended, implying that the reasons might rest *in gremio judicis*.

It is next contended that the court erred in extending the time for serving and filing the motion for a new trial, and in granting a new trial. Reliance is put upon Laws 1893, page 414, § 24:

"And the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired."

We think it may be assumed that no "good cause" was shown by affidavit in this case, but the right of a trial judge to review the evidence and to grant a new trial, when in his

judgment the evidence is insufficient to sustain the verdict, cannot be denied. This he may do in the absence of all statutes. The inherent power of the courts to grant a new trial where it appeared that an injustice had been done is recognized in the first case reported on that subject of the law. *Wood v. Gunston*, Style 466 (1655). In *Bright v. Eynon*, 1 Burr. 390, 395, Lord Mansfield said:

"The rule laid down by Lord Parker, in the case of the *Queen* against *the Corporation of Helston*, H. 12 Ann. B. R. (Luca's Rep. 202), seems to be the best general rule that can be laid down upon this subject, viz., 'doing justice to the party,' or, in other words, 'attaining the justice of the case.' The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances."

The enumeration of grounds for a new trial "does not restrict the inherent power of the courts to relieve a party where an injustice has been done, or to grant new trials for any other sufficient cause not enumerated unless the restriction is expressed. The statutory grounds are generally so broad as to exclude all the errors, accidents and exigencies which might work injustice at the trial." 14 Ency. Plead. & Prac., 718. Wherefore, the power to grant a new trial where injustice has been done or, to put it in other words, where the testimony is insufficient to sustain the verdict, being inherent in the court, we must assume that the "cause shown" is any cause which moves the court to its conclusion, and which is not shown to be arbitrary or contrary to all the evidence. *Commonwealth v. McElhaney*, 111 Mass. 439.

Appellant contends that, inasmuch as there was evidence to sustain the verdict, the judgment should stand. It is the particular province of the trial judge to pass upon the weight of the testimony, being himself an actor in the trial, and in position to measure the personality of the witnesses. And unless the evidence be undisputed, or it appears that there has been a clear abuse of discretion, an appellate court cannot review his order when made to rest upon the ground

of insufficiency of evidence. We may grant that the evidence in this case is conflicting, but it is such conflict that calls for the rule as we have stated it, and this court has consistently affirmed the judgment of trial courts in all such cases. *Rinehart v. Watson*, 11 Wash. 526, 40 Pac. 127; *Best v. Seattle*, 50 Wash. 533, 97 Pac. 772; *State v. Symes*, 17 Wash. 596, 50 Pac. 487; *Colvin v. N. P. R. Co.*, 42 Wash. 5, 84 Pac. 616; *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132; *Cummings v. Sunich*, 44 Wash. 665, 87 Pac. 949; *O'Rourke v. Jones*, 22 Wash. 629, 61 Pac. 709; *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109; *Tacoma v. Tacoma L. & W. Co.*, 16 Wash. 288, 47 Pac. 738; *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176; *Holgate v. Parker*, 18 Wash. 206, 51 Pac. 368; *McBroom & Wilson Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572; *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832; *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108.

Judgment affirmed.

MOUNT, MORRIS, CROW, and FULLERTON, JJ., concur.

[No. 9271. Department One. April 25, 1911.]

MARY SMITH, *Respondent*, v. W. L. SMITH, *Appellant*.[1]

INTEREST—JUDGMENTS—DECREE OF DIVORCE. A decree of divorce, directing the husband to pay the wife a stated sum as her proportionate part of the community property and attorney's fees, is a judgment, within Rem. & Bal. Code, § 457, which draws interest from date, the code procedure recognizing no distinctions between judgments and decrees.

DIVORCE—ALIMONY—PAYMENT—CREDITS — CONTRACTS — CONSTRUCTION. Where, on appeal from a decree of divorce awarding a sum of money in lieu of property, and $25 per month for the support of children, the appellant agreed to pay $65 for the support of the children pending the appeal in consideration of an agreement not

[1]Reported in 115 Pac. 166.

to issue execution on the judgment, the increased payments cannot be credited on the judgment, since they are supported by an independent consideration.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered June 16, 1910, upon findings in favor of the plaintiff, directing the payment of interest on a judgment rendered in an action for divorce, after a hearing before the court without a jury. Affirmed.

W. M. Nevins and *Merritt, Oswald & Merritt*, for appellant.

Robertson & Miller, for respondent.

FULLERTON, J.—On May 25, 1909, the superior court of Spokane county entered a decree of divorce in favor of the respondent, by which the appellant was required to pay the respondent the sum of $5,000 as a part of her proportionate share of the community property of the parties, the sum of $500 for attorney's fees, and the further sum of $25 per month until the further order of the court for the maintenance and support of the children of the parties. The appellant appealed from the decree, but the same was affirmed in this court on December 24, 1909. *Smith v. Smith*, 56 Wash. 461, 105 Pac. 1030. During the pendency of the appeal, the appellant paid to the respondent, for the maintenance of the children, the sum of $65 per month, under an agreement with the respondent's counsel that in consideration thereof no execution would be issued on the decree pending the appeal. After the affirmance of the decree, the appellant paid into court the sums awarded the respondent, without interest, and this proceeding was instituted to compel him to pay interest on the judgment at the rate of six per centum per annum from the sixth day of June, 1909, that being the date fixed in the decree when the sums awarded the respondent was required to be paid. The present appeal is from the last mentioned order.

The appellant contends that a decree such as is involved in this proceeding does not draw interest, since interest was not specially provided for therein. He argues that such a decree is not a judgment within the meaning of the statutes, and hence, does not fall within the provisions of the statute relating to interest upon judgments. Rem. & Bal. Code, § 457. But we think the contention untenable. There is no distinction under the code between a decree and a judgment; each is the final determination of the rights of the parties in the action. Indeed, in the nomenclature of the code from which ours was so largely borrowed, the terms "decree" had no place. Previously existing forms of action were abolished, and the procedure for the enforcement or protection of private rights and the redress of private wrongs were termed "actions," the final determination of the rights of the parties therein "judgments," and the intermediary direction of the court, made in writing and not included in the final judgment, were called "orders." But it was found later in practice that, while forms could be abolished, substance could not, and that it was sometimes convenient to use the term "decree" to distinguish the final determination of the rights of the parties in a proceeding of equitable cognizance from that of a purely law action, and the legislature itself has, in certain instances, adopted this practice. See Rem. & Bal. Code, §§ 1119, 1121, 1123. Moreover, in the very act authorizing and regulating the granting of divorces, the final determination of the rights of the parties is referred to indiscriminately as the "judgment," or the "decree," once so, at least, in a single section. See Rem. & Bal. Code, §§ 991, 992, 996. But in the use of the one term for the other there was no intent to mark a distinction. Whether the final determination of the rights of the parties be called the "judgment" or the "decree" it has the same effect, and has attached thereto the same rights and privileges. We think, therefore, that the decree in the case at bar drew interest from the date it required the sums awarded the wife to be paid.

The second contention is that the appellant should be allowed a credit for the difference between the sums actually paid for the maintenance of the children during the time the appeal was pending and the sum directed to be paid by the decree. But the appellant did not pay this increased sum by way of satisfaction of the judgment. He paid it to avoid the trouble and expense of giving a supersedeas bond pending the appeal, under an agreement with the other side. This agreement was a sufficient consideration for the increased payment, and no rule of law or equity requires it to be credited as a payment made in satisfaction of the terms of the decree.

The order appealed from is affirmed.

DUNBAR, C. J., MOUNT, and PARKER, JJ., concur.

[No. 9309. Department One. April 25, 1911.]

JOHN J. PETH *et al.*, *Respondents*, v. EDDIE E. SPEAR *et al.*, *Appellants*.[1]

CHARITIES—CREATION—PURPOSE OF TRUST—EDUCATION. A charitable trust for educational purposes is created by conveyances in trust for the benefit of the membership of a brotherhood for the purpose of a communal industrial institution and the education of the people in the principles of socialism.

CHARITIES—BENEFICIARIES—CERTAINTY. A conveyance for charitable purposes, in trust for the membership, now existing or hereafter to exist, of an unincorporated brotherhood, is not invalid because the beneficiaries are an unascertained or uncertain body or class, that being characteristic of charitable trusts.

CHARITIES—CESSATION OF USE—QUIETING TITLE—ANSWER. In an action to quiet title, an answer alleging that a charitable trust had failed by reason of the fact that the beneficiaries had procured a dissolution of the society through the courts, and a judicial sale of the land, which was void, does not show that the title reverted to the donors of the trust, but only shows a cessation of the uses for which the property was devoted, and is insufficient, on demurrer, to show title in the successors of the donors.

[1]Reported in 115 Pac. 164.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered May 24, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Parker & Brown, for appellants.

Million, Houser & Shrauger, for respondents.

FULLERTON, J.—The respondents brought this action against the appellants, Eddie E. Spear, David H. Barry, Inza J. Barry, his wife, and others, to quiet title to certain real property situated in Skagit county. The complainants did not attempt to deraign their title in their complaint, but alleged generally that they were the owners in fee simple of the land in question, that they were in possession and entitled to the possession of the same, and that the appellants claimed some title, interest or estate in the premises adverse to them, which claim, they further alleged, was invalid, unlawful, and of no effect. The prayer of the complaint was for a decree quieting title to the property in the plaintiffs against the claims of the defendants. Of the persons made defendants and served with process, the appellants above named alone appeared. They filed an answer to the complaint, putting in issue the allegations of title and ownership in the plaintiffs, admitting, however, their possession of the lands; and by way of an affirmative answer, deraigned the source of the plaintiffs' title as well as their own, averring that they had an equitable title to the property superior to the title of the plaintiffs. The trial court sustained a demurrer to the affirmative answer, and after the election of the appellants to stand thereon, tried the issues raised by the allegations of the complaint and the denials thereof contained in the answer, finally entering a decree quieting title to the premises as prayed for in the complaint. The question for determination therefore is, does the affirmative answer show such title to the premises in the appellants as entitles them to question the title and possession of the respondents.

In the affirmative answer it was alleged, in substance, that on December 30, 1897, certain named persons purchased a portion of the land in question, and caused it to be deeded to one G. E. Pelton, who took it and held it in trust for the purchasers, agreeing to convey it at such time to such persons and on such conditions as the purchasers should direct. That on the next day, pursuant to the direction of the purchasers, Pelton conveyed the property to certain named persons, some seven in number, in trust for the benefit of the "membership now existing and hereafter to exist of the Brotherhood of the Co-Operative Commonwealth," which is described as an "unincorporated association or body of persons acting together for the purpose of owning, acquiring, operating, conducting and maintaining a communal industrial institution, and the education of the people in the principles of socialism." On June 1, 1898, the remainder of the tract in question was deeded to a body of seven trustees, all of whom are named in the body of the deed. The persons named as trustees, however, are not the same as those named in the first deed, three of those first named being omitted and three others substituted. The conditions of the latter deed were the same as the first.

As to the manner in which the trust was administered by the trustees, the answer is somewhat meager. It can be gathered therefrom, however, that the trustees permitted any one who claimed to belong to the general class above described to enter upon and occupy the premises for such period of time as he desired to stay on payment of a certain membership fee. As to the immediate management of the brotherhood's internal affairs, such as the uses to which the land should be put, the number of hours any one should labor, and the character of the labor each should perform, seems to have been left to the members themselves.

It appears that the brotherhood during its earlier history enjoyed fair prosperity. The land was cleared and brought into a high state of cultivation, and useful and extensive

buildings and other improvements were constructed thereon. It is alleged, however, that dissensions gradually began to creep in; that the brotherhood gradually filled up with a class of persons having none of the virtues of industry possessed by the earlier members; that these newer members soon began to put in practice vices not in consonance with the laws of the land, nor in consonance with the more strict ideas of the earlier members; that the result was the division of the membership into factions, which engaged in bitter quarrels and riotous actions over the right to the management and control of the organization and the possession of its property; that these finally became so bitter that a resort to an action in court was had, in which a receiver was appointed, the property sold, and the proceeds divided up between the several members of the brotherhood, which then dispersed.

It is then alleged that the plaintiffs derive their title through this sale; that the title so acquired is invalid and void for want of jurisdiction of the court making the sale, over the persons in whom the legal and equitable title to the property was vested, such persons not being parties to the proceedings under which the property was sold; that the defendants named, appellants here, are the successors in interest of the persons who originally paid the purchase price of the land; that as such they have the superior equitable title to the property against all the world; and that they are entitled to a decree transforming their equitable title into a legal title, and awarding the possession of the property to them.

Based on the facts recited, the appellants argue that the uses expressed in the trust deeds are not charitable; that the trust is void because there are no ascertained beneficiaries, and no beneficiaries capable of ascertainment for whose benefit the trust can be enforced; that since the trust expressed is void, the transaction resulted in an implied trust, in which the trustees named in the deed held the legal title for the benefit of the persons who paid the purchase price; and since

the appellants are the successors in interest of such persons, they are now entitled to declare the trust at an end and have the legal title of the trustees conveyed to them, and such rights in the property as pertain to and follow the legal and equitable title.

But we think the appellants are mistaken in their contention that the use for which the property was donated by their predecessors in interest was not a charitable use. Since the purpose of its donors was to provide a place where the doctrines of socialism could be taught by example as well as by precept, the trust can be said to belong to that species of charitable trusts known as educational. As such it is among the objects enumerated as charitable by the statute of 43 Eliz., c. 4, and within practically all the definitions of a charitable use as announced by the authorities. As is said in 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1023:

"Gifts, devises, and bequests in trust for educational purposes are valid, since they are all clearly within the spirit of the statute. This class embraces all trust for the founding, endowing, and supporting schools and other similar institutions which are not strictly private; for the establishment of professorships, and maintenance of teachers; for the education of designated classes of persons, as the poor children of a town; for the promotion of science and scientific studies; and generally for the advancement of knowledge, learning, and education."

Nor is the trust rendered invalid by the fact that the beneficiaries of the trust are an indefinite number of persons or of an uncertain body or class. Indeed, these requisites are essential to a charitable trust.

"One of the distinguishing elements of a 'charitable' as compared with an ordinary trust consists in the generality, indefiniteness, and even uncertainty which is permitted in describing the objects and purposes or the beneficiaries. From the very definition of a 'charitable trust' the beneficiaries are always an uncertain body or class; but the doctrine goes further than this. If the donor sufficiently shows his intention to create a charity, and indicates its general nature and

purpose, and describes in general terms the class of beneficiaries, the trust will be sustained and enforced, although there may be indefiniteness in the declaration and description, and although much may be left to the discretion of the trustees." 3 Pomeroy, Equity Jurisprudence (3d ed.), § 1025.

So in *Russell v. Allen*, 107 U. S. 163, it was said:

"By the law of England from before the Statute of 43 Eliz. c. 4, and by the law of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead."

Since, therefore, the trust was valid, and the uses for which the property was donated were capable of being carried into effect, it follows that the trust is still in existence and the appellants are without interest, unless it can be said that the purposes of the express trust have failed. As to this the answer is silent. The only allegation in the answer on this subject is that certain of the so-called beneficiaries of the trust procured a dissolution of the society through the courts, sold the trust property, divided the proceeds among themselves, and left the land. If this proceeding was invalid, as

the appellants contend, then there has been no sale of the property or dissolution of the society, and hence no failure of the purposes of the trust. On the other hand, if the proceedings be valid, then there was a valid disposition of the property which cut off the appellants' interests and they cannot recover in any event. But we think a proper construction of the answer is that there has been only a cessation of the use for which the property was originally donated, and that such use can be resumed again at any time by the trustees named in the deeds.

This view of the case renders it unnecessary to discuss the validity of the respondents' title. Since the appellants have none, they cannot question the possession which concededly the respondents have. The judgment is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

[No. 9151. Department Two. April 27, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK MORROW, *Appellant*.[1]

CRIMINAL LAW — PROSECUTIONS — STATUTES — REPEAL — SAVINGS CLAUSE. Offenses prior to the enactment of the new penal code (Rem. & Bal. Code, § 2753 *et seq.*), are properly prosecuted under the laws in force at the time the offense was committed, being expressly saved by the repealing clauses of the later enactment.

CRIMINAL LAW—APPEAL—RECORD—INSTRUCTIONS—EXCEPTIONS. Error cannot be predicated upon the instructions where the record on appeal does not include the instructions or any exception thereto.

CRIMINAL LAW—EVIDENCE—IDENTIFICATION—OPINIONS. The identification of a person need not be positive and certain, but the witness may state that she believes that the accused is the person who committed the crime.

RAPE—CORROBORATION OF PROSECUTRIX—EVIDENCE—SUFFICIENCY. A conviction of statutory rape is sufficiently sustained by corroboration of the prosecutrix, where her story as to being taken to a lodging house by the defendant as his daughter and occupying the

[1]Reported in 115 Pac. 161.

same room, after the landlady had prepared a couch for her, and of stopping at a drug store with him the evening before, and at a restaurant the next morning, is corroborated by witnesses who saw them at the drug store and restaurant, and by the landlady who remembered the occurrence but could not identify the girl nor positively identify the accused.

Criminal Law—Trial—Witness—Omission of Oath. It is not prejudicial error that by inadvertence a witness gave part of his testimony without being sworn, where it was immediately withdrawn, and repeated after the witness was sworn.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 21, 1910, upon a trial and conviction of rape. Affirmed.

Will H. Thompson, for appellant.

George F. Vanderveer and *A. G. McBride*, for respondent.

Crow, J.—Appellant was tried and convicted upon an indictment which, omitting formal parts, reads as follows:

"Frank Morrow is accused by the grand jury of the state of Washington for the county of King, by this indictment, of the crime of rape, committed as follows: That Frank Morrow, at the county of King, state of Washington, on the 10th day of August, A. D. 1907, in and upon one Maud Wilson, a female child under the age of eighteen years, to wit, of the age of sixteen years, and not the wife of the said Frank Morrow, feloniously did make an assault, and her, the said Maud Wilson, then and there feloniously did carnally know. Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington.

"Dated at Seattle, Washington, this 25th day of February, A. D. 1910."

The prosecution was under subdivision 3 of § 2753, Rem. & Bal. Code. Appellant contends the trial judge erred in directing his trial under this section, which he insists has been repealed by the enactment of our present criminal code, Laws 1909, chap. 249, page 890; Rem. & Bal. Code, § 2253 *et seq.* There is no merit in this contention. Under repeated holdings of this court he was properly tried under

Rem. & Bal. Code, § 2753, which was the statute in force at the date of the crime charged. *State v. Hanover*, 55 Wash. 408, 104 Pac. 624; *In re Newcomb*, 56 Wash. 395, 105 Pac. 1042; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064.

Complaint is made of error alleged to have been committed in a portion of the instructions, and in the giving of an oral instruction while ruling on the admissibility of evidence, which oral instruction was not thereafter incorporated in the formal written instructions. This assignment cannot be considered. The record neither includes the written instructions, nor does it disclose any exceptions taken by appellant.

The state announced its election to rely for conviction upon an act of intercourse claimed to have occurred on December 5, 1908. Appellant insists the evidence was insufficient, his controlling contention being that the testimony of the prosecuting witness, Maud Wilson, as to the particular act selected by the state was not sufficiently supported or corroborated by other evidence. Under our statute her testimony must be corroborated. She testified that, on December 5, 1908, when she was temporarily employed at a private residence of one Brandt in the city of Seattle, appellant called there for her, took her to a store on Seventh and Pike streets, and purchased her a new coat; that wrapping her old one in a paper, she carried the package in her hands, that they then proceeded to a corner drug store where appellant left her while he went to a lodging house near by and secured a room; that he returned and took her from the drug store to the lodging house; that the landlady objected to their occupying the same room; that appellant, who was then about forty-six years of age, said the prosecuting witness was his daughter, and that he could not afford to pay for two rooms; that the landlady placed a lounge for the prosecuting witness in the room, which was already furnished with a bed; that appellant and the prosecuting witness occupied the room that night and had sexual intercourse, and that next morning ap-

pellant took her to a near-by restaurant for breakfast. Mr. Brandt testified that he recognized the prosecuting witness as having lived at his home for about a week, that he remembered the incident of a man calling there, but that he could not positively identify the defendant as that man. Officer Adams, a detective of the Seattle police department, testified that he had known appellant for a number of years; that he saw him with the prosecuting witness at the corner drug store, not far from the lodging house, on the evening mentioned; that he observed her while she was waiting alone, and noticed her having a package; that he saw appellant take her away; that he supposed she was appellant's daughter; and that he could fix the time by reason of a recent violent death as to which he was then seeking information. The landlady testified to the incident of a man calling at her place at the time mentioned. She said he engaged the room, and shortly thereafter returned with a young girl; that she objected to them occupying the same room; that he claimed the girl was his daughter; that she put a lounge in the room for the girl; that they occupied the room that night; that although not positive, she thought the appellant was the same man; and that by reason of some subsequent interview, not stated, which had occurred between her and the prosecuting witness, she was of the opinion she was the girl, although she could not so testify. A waitress in the near-by restaurant testified she saw appellant and the prosecuting witness taking breakfast together the next morning.

Appellant insists the evidence of the landlady was incompetent and improperly admitted, as she did not positively identify the girl, and that she should not have been permitted to state her opinion as to the identity of appellant. Her evidence thus stating her opinion was competent. *State v. Murphy*, 15 Wash. 98, 45 Pac. 729.

"The evidence on the question of the identity of the prisoner is permitted to take a broad range. Any fact which shows the acquaintance and familiarity of the witness testifying to

the identity of defendant is admissible. The identification by the witness need not be positive and certain, but it is enough for him to testify that he believes or has an impression that the accused is the person he saw commit the crime. 12 Cyc. 392.

See, also, *Craig v. State*, 171 Ind. 317, 86 N. E. 397.

The landlady did not testify that she could identify the girl, but did say she thought the appellant was the man who engaged the room, although not positive. Her account of the incident that had occurred with a man and girl as previously narrated by the prosecuting witness, coupled with the statement of her opinion that appellant was the man, although she was not positive, was admissible, the jury being the judges of the credibility and weight of her evidence. The evidence of these various witnesses and the circumstances stated by them were sufficient corroboration of the prosecuting witness to warrant a conviction. It might be further stated that the prosecuting witness also testified to other criminal acts of the appellant, several of which occurred in the city of Tacoma. As to one instance, a Tacoma hotel clerk testified that appellant had registered himself and the prosecuting witness as father and daughter; that they had occupied the same room, and that he recognized and identified them.

One witness for the state had testified at some length before it was discovered that he had not been sworn. When the prosecuting attorney called attention to this omission, the trial judge immediately withdrew his evidence from the jury. The witness was thereupon sworn and repeated his statements. The appellant moved the court to withdraw the case from the jury, to discharge the jury, and to call another to try the cause, and now insists that the trial judge erred in denying these motions, and in permitting the witness to again testify after being sworn. We find no merit in this contention. The evidence repeated under oath, after the witness had been duly sworn, was substantially the same

as that previously given, and we fail to see that the appellant was prejudiced. In *Southern R. Co. v. Ellis*, 123 Ga. 614, 51 S. E. 594, the third syllabus prepared by the court reads as follows:

"Where, by inadvertence a witness was not sworn before giving testimony in regard to the case on trial, upon the discovery of such fact pending the trial there was no error in permitting him to be recalled to the stand and sworn and allowed to testify as a witness."

In *Slauter v. Whitelock*, 12 Ind. 338, it was held that, if a mistake in not having a witness sworn is discovered before the jury retired, it may be corrected by swearing the witness and rehearing his testimony, or the jury may be instructed to disregard his statements. Both of these methods of procedure were adopted by the trial judge in this cause, which certainly afforded the appellant every protection to which he was entitled.

After an examination of the entire record, and a careful consideration of all points presented and urged by the appellant, we are unable to conclude that any prejudicial error has been committed. The appellant has been awarded a fair trial, has been ably and skillfully defended, and the verdict of the jury must stand.

The judgment is affirmed.

Dunbar, C. J., Chadwick, and Morris, JJ., concur.

[No. 9019. Department Two. May 2, 1911.]

THE STATE OF WASHINGTON, *Appellant*, v. L. H. DARWIN, *Respondent*.[1]

LIBEL AND SLANDER—CRIMINAL COMPLAINT—DEMURRER — CONCLUSIONS. Upon demurrer to a complaint for criminal libel, the court must determine from the facts alleged whether the publication tended to expose the complainant to hatred, contempt or obloquy, or to injure him in his business, within Rem. & Bal. Code, § 2424, regardless of the conclusions of the pleader in that regard.

SAME—SUFFICIENCY—PUBLICATION—LIBELOUS PER SE—TRUTH. A complaint alleging the malicious publication in defendant's newspaper of a list of conditional sales made by a furniture dealer to various patrons, as shown by memoranda legally filed by him in the auditor's office two years previously, the truth of which was unquestioned, contains no words libelous *per se*, and does not charge criminal libel when it fails to state facts showing that it tended to expose him to hatred, contempt, or obloquy, or to injure him in his business, within Rem. & Bal. Code, § 2424, defining criminal libel; and the conclusions of the pleader to that effect must be disregarded.

CRIMINAL LAW—COMPLAINT—DEMURRER. A demurrer to a complaint for criminal libel only admits the facts alleged and not the pleader's conclusions.

Appeal from a judgment of the superior court for Whatcom county, Gilliam, J., entered May 24, 1910, dismissing a prosecution for libel, upon sustaining a demurrer to the complaint. Affirmed.

George Livesey, Brown, White & Peringer, and *Craven & Greene*, for appellant, contended, among other things, that the inducement and innuendo are sufficiently set forth in the allegations that the publication did not give the dates of the filings, which were in fact nearly two years previous, etc., and exposed the complainant to the hatred, contempt, ridicule and obloquy of the public and of those dealing with him, and of the vendees named in the conditional sales, and tended to injure, and did injure, him in his business by virtue of the fact that his customers were driven from him by reason

[1]Reported in 115 Pac. 309

of the publication. 25 Cyc. 575, 578; *Squires v. State*, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. 904; *State v. Grinstead*, 62 Kan. 593, 64 Pac. 49; *People v. Seeley*, 139 Cal. 118, 72 Pac. 834; *State v. Nichols*, 15 Wash. 1, 45 Pac. 647. When words are not libelous *per se*, it is proper and necessary to allege and prove innuendo, colloquiam or inducement. 2 Current Law, p. 730; 8 Current Law, 732; 13 Ency. Plead. & Prac. 99-102; *State v. Osborn*, 54 Kan. 473, 38 Pac. 572; *People v. Collins*, 102 Cal. 345, 36 Pac. 669; *Commonwealth v. Child*, 13 Pick. 198; *State v. Mott*, 45 N. J. L. 494; *People v. Jackman*, 96 Mich. 269, 55 N. W. 809; *Denney v. Northwestern Credit Ass'n*, 55 Wash. 331, 104 Pac. 769, 25 L. R. A. (N. S.) 1021; *State v. Elliott*, 63 Kan. 879, 64 Pac. 1027; *State v. O'Hagan*, 73 N. J. L. 209, 63 Atl. 95. The publication was not privileged. Rem. & Bal. Code, §§ 2430, 2428. A publication so long subsequent to the time when the matters transpired is an abuse of the privilege. 25 Cyc. 571; *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S. W. 462, 127 Am. St. 627. That there was no privilege, see, also, 25 Cyc. 405; Bishop, Criminal Law (7th ed.), 914; 2 Wharton, Criminal Law, 1629; *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 33 N. W. 181; *Sherwood v. Powell*, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. 614, 29 L. R. A. 153; *Morse v. Times-Republican Print. Co.*, 124 Iowa 707, 100 N. W. 867; *Holmes v. Clibby*, 121 Ga. 241, 48 S. E. 934, 104 Am. St. 103; *State v. Haskins*, 109 Iowa 656, 80 N. W. 1063, 77 Am. St. 560, 47 L. R. A. 223; *Sheckell v. Jackson*, 64 Mass. 25; *Kimball v. Post Pub. Co.*, 199 Mass. 248, 85 N. E. 103, 127 Am. St. 492, 19 L. R. A. (N. S.) 862. Any privilege is of no avail by reason of the express malice. Bishop, Criminal Law (7th ed.), 914; 3 Supp. Am. & Eng. Ency. Law, p. 1055; 18 Am. & Eng. Ency. Law (2d ed.), 1045, 1048; Rem. & Bal. Code, § 2428; *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 130 Am. St. 390, 20 L. R. A. (N. S.) 361; *Nichols v. Eaton*, 110 Iowa 509, 81 N. W. 792, 80 Am. St. 319, 47 L. R. A. 483; *Stewart v. Major*,

17 Wash. 238, 49 Pac. 503; *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866; *McClure v. Review Publishing Co.*, 38 Wash. 160, 80 Pac. 303; *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627; *Edwards v. Chandler*, 14 Mich. 471, 90 Am. Dec. 249; *Trimble v. Morrish*, 152 Mich. 624, 116 N. W. 451.

Neterer, Pemberton & Sather, for respondent, contended, *inter alia*, that there is nothing in the publication that in any way reflects upon the honesty, capacity, fidelity, integrity or morality of the prosecutor or connects any such imputations with his trade or business, or holds him up to scorn, ridicule, contempt and execration or imputes any loathsome disease or implies the commission of a crime. Townsend, Libel and Slander, p. 265; *Crocker v. Hadley*, 102 Ind. 416, 1 N. E. 734; *Shattuc v. McArthur*, 25 Fed. 133. When language is not libelous *per se* the meaning cannot be extended by innuendo. 25 Cyc. 578; *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747; *People v. Jerome*, 1 Mich. 142; *Bloss v. Tobey*, 2 Pick. 320; *Boynton v. Shaw Stocking Co.*, 146 Mass. 219, 15 N. E. 507; *Newbold v. Bradstreet & Sons*, 57 Md. 38, 40 Am. Rep. 426.

Crow, J.—The only question in this cause is the sufficiency of a criminal complaint, to which the trial judge sustained a demurrer. The state elected to stand upon the complaint, and has appealed from an order discharging the defendant.

The complaint, originally filed before a justice of the peace, omitting formal parts, reads as follows:

"T. S. Hamilton, being first duly sworn on his oath, deposes and says: That in Whatcom county, Washington, on or about the 12th day of April, 1910, the above named defendant, L. H. Darwin, did commit the crime of criminal libel as follows:

"Then and there being, the said defendant, L. H. Darwin, being then and there the business manager of the American Printing Company, a corporation, by which The Morning Reveille, a newspaper published at Bellingham, Washington,

and having a general circulation in and about Bellingham, Whatcom county, Washington, is, and was, then and there issued, did then and there unlawfully and maliciously defame and libel the complainant by then and there unlawfully and maliciously making public and publishing in said The Morning Reveille, and by then and there unlawfully and maliciously causing and procuring to be made public and to be published in said The Morning Reveille the defamation and libel of the said complainant, T. S. Hamilton, by words, printing and writing, tending to expose the said complainant to hatred, contempt, ridicule, and obloquy and to injure the said complainant in his business and occupation; that the said publication, printing and writing was an article then and there published in said The Morning Reveille as aforesaid and more particularly in substance, language and words, as follows:

"'CONDITIONAL SALES.

"'T. S. Hamilton (B. B. Furniture Company), to Mrs. Emily Sarlund, go-cart, $10.

"'T. S. Hamilton (B. B. Furniture Company), to Mrs. C. R. Halladay, go-cart, $13.

"'T. S. Hamilton (B. B. Furniture Company), to Miss Sophia Anderson, oil stove and oven, $12.

"'T. S. Hamilton (B. B. Furniture Company), to W. J. Hammons, twenty-five yards of carpet, $12.50.

"'T. S. Hamilton (B. B. Furniture Company), to William Mullin, furniture, $12.60.

"'T. S. Hamilton (B. B. Furniture Company), to Mrs. E. Huefner, range, $60.'

"That the complainant herein now is, and for a number of years last past has been, engaged in the sale of furniture at retail in Bellingham, Whatcom county, Washington; and his said business was, and is, known and designated as the 'B. B. Furniture Company;' that in connection with his said business complainant has made, and does now make, conditional sales contracts with his various patrons; that in said contracts the said T. S. Hamilton was, and is, named as the vendor and the various purchasers or customers as vendees, and that said conditional sales contracts at all times have been, and now are, filed in the office of the Auditor of Whatcom county, Washington, and indexed therein in the name of T. S. Hamilton as vendor and the several purchasers as

vendees; that the name 'B. B. Furniture Company' does not appear upon the index in the records in the office of said Auditor of Whatcom county, Washington, and that none of said contracts are filed or indexed in the name of said B. B. Furniture Company; that the said defendant, L. H. Darwin, publishes and causes to be published in said The Morning Reveille, and on the 12th day of April, 1910, did publish and cause to be published in said The Morning Reveille, a report and statement of the filings in the office of the said Auditor of Whatcom county, Washington, for the day or days immediately preceding the publication of said items, and that the publication of said filings for said day or days is and was made under the heading in said publication entitled 'Court House Record,' and that only items and filings of recent date were and are published in said list; that on said 12th day of April, 1910, the said defendant, L. H. Darwin, did unlawfully and maliciously publish, cause to be published, and procure the publication of the libel above set forth, and did on said date unlawfully and maliciously publish, cause to be published, and procure the publication of said libel in a place in said paper separate and apart from the publication of said report of filings in the said Auditor's office and under a heading in bold faced type entitled 'Conditional Sales,' and inserted therein as a part of said filing record the words 'B. B. Furniture Company;' that no sales other than as made by complainant are set forth in said libel; that all of the items set forth in said libel are and were contracts for sales that had been made and filed in said Auditor's office by said T. S. Hamilton approximately two years prior to the publication of said libel, and that in said libel so published neither the dates of said contracts nor the date of the filing thereof was set forth, and that in the publication of said 'Court House Record' the said dates are and were given; that said conditional sales contracts so mentioned in said libelous publication had all been fully paid and satisfied long prior to the publication of said libel.

"That the publication of said libel, as specified, and the publication of the names of the purchasers named in the said conditional sales referred to and mentioned in said libel, tended to expose, and did expose, complainant to the hatred, contempt, ridicule and obloquy of the persons named as the vendees or purchasers in the conditional sales designated and

mentioned in said libel, and tended to expose, and did expose, complainant to the hatred, contempt, ridicule and obloquy of the public, and tended to injure, and did injure, complainant in his business and occupation, in that it tended to deter, and did deter, complainant's customers and the public and the persons named as vendees or purchasers in said libel from further dealing or transacting business with complainant to his financial loss.

"That the said defendant, L. H. Darwin, did make said libelous publication, and cause and procure same to be made thus unlawfully, wilfully and maliciously, knowing that the same would tend to expose the complainant to hatred, contempt, ridicule and obloquy, and knowing the same would tend to injure the complainant in his business and occupation; and the said defendant did thereby intend to expose the said T. S. Hamilton to public hatred, contempt, ridicule and obloquy, and to injure the said T. S. Hamilton in his business and occupation."

Respondent was convicted on this complaint before the justice of the peace, and appealed to the superior court, where the demurrer was sustained. Appellant's only assignment is that the trial judge erred in sustaining the demurrer and discharging respondent. The prosecution is based upon Rem. & Bal. Code, § 2424, which reads as follows:

"Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend:

"(1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or . . .

"(3) To injure any person, corporation or association of persons in his or their business or occupation, shall be a libel. . . ."

Appellant contends the publication tended to expose the complainant to hatred, contempt, ridicule and obloquy; that it was malicious, was made without justification or excuse; that it tended to injure complainant in his business; that criminal libel is charged in the language of the statute, and that the complaint is sufficient.

While no reasonable excuse appears for making the publication, and the motive that actuated it may not have been commendable, and although it may have annoyed the complainant, yet, from the facts pleaded, we do not conclude that it amounted to a criminal libel. Although no dates of sales were mentioned in the publication, it is nevertheless conceded the sales were actually made by Hamilton in the due course of his business. There is no question but that they were conditional sales, and that for his own protection he filed memoranda thereof, with the county auditor, under the authority of Rem. & Bal. Code, § 3670 *et seq.* Publication at any time thereafter of the fact that he had made such filings would not tend to expose him to hatred, contempt, ridicule, and obloquy; nor are we able to understand how it would tend to injure him in his usual business which he was conducting in the manner stated.

If there was any circumstance, such as the nature, value or quantity of the merchandise sold, which could by any possibility be construed as tending to reflect upon the vendor, and subject him to contempt and ridicule, that fact must have been known to him when he made the conditional sales and filed their memoranda with the county auditor. There is no intimation that his business methods or the making of such sales were not legitimate or honorable. The complaint alleged the publication was made long after the dates of the respective sales and after payment of the purchase price. Of this fact the vendor Hamilton cannot complain. It could in no manner injure him in his credit or business standing. If it could, his methods which he himself adopted, must have been at fault. The only possible persons, if any, whose credit or financial standing could have been affected by so late a publication, were the vendees, who had then made full payment, but the respondent is not charged with having libeled them.

Although the complaint follows the language of the statute in making its charges, the statements upon which appellant

relies are simply conclusions of the pleader deduced from the facts alleged. It is for the court to determine whether the facts pleaded sustain such conclusions. Conceding the publication to have been unwarranted and at the same time irritating and annoying to Hamilton, yet it only states facts taken from public records, the truth of which is not questioned. The alleged publication contains no words libelous *per se*. Appellant insists that extrinsic circumstances have been pleaded as inducement and innuendo, which, coupled with the language published, are sufficient to show that the publication tended to produce, and did produce, the results which the statute is intended to prohibit. In support of this contention appellant cites, with others, the following authorities: *Denney v. Northwestern Credit Ass'n*, 55 Wash. 331, 104 Pac. 769, 25 L. R. A. (N. S.) 1021; *State v. Elliott*, 10 Kan. App. 69, 61 Pac. 981; *State v. O'Hagan*, 73 N. J. L. 209, 63 Atl. 95.

An examination of these cases will disclose that, if pertinent at all, they tend to show the insufficiency of this complaint. *Denney v. Northwestern Credit Ass'n, supra*, was a civil action for damages predicated on an alleged libel. We there said:

"In all charges of this kind, it is the duty of the court to regard the words spoken or written as might a stranger to the parties, and if they be in themselves, and without the aid of innuendo, otherwise innocent, and if they do not in themselves, and without the aid of the special knowledge possessed by the parties concerned, imply malice, or hold the party out to public contempt or ridicule, or make any charge involving moral turpitude, or touch him in his business, or subject him to an infamous punishment, it is the general rule that they are not libelous *per se*. If the words do not come within this rule,

" 'It is necessary that the declaration should set forth precisely in what way the damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. . . . By special

damage in such a case is meant pecuniary loss.' *Pollard v. Lyon*, 91 U. S. 223, 237, 23 L. Ed. 308.

"See, also, 5 Ency. Plead. & Prac., 766; 25 Cyc. 455; *Dunn v. Maier*, 82 Fed. 169; *Bradstreet Co. v. Oswald*, 96 Ga. 396, 23 S. E. 423; *Newbold v. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426."

Appellant concedes the publication here involved is not libelous *per se*. We find no allegations sufficient to show that Hamilton was actually damaged or injured, personally or in his business. The complaint only states the pleader's conclusions to that effect. Hamilton first published the matter set forth in the complaint when he filed the memoranda of the conditional sale contracts, and caused them to become public records, the publication of which is privileged. An information will not lie for publishing words charging a person with having done that which he may legally and properly do. It is conceded the conditional sales memoranda were legally and properly filed. The publication was truthful. The demurrer only admitted facts alleged and not the pleader's conclusions. The latter must be ignored in passing upon the sufficiency of the complaint. Thus considering the complaint, we conclude it does not state facts sufficient to charge criminal libel.

The judgment is affirmed.

Dunbar, C. J., Morris, and Chadwick, JJ., concur.

[No. 9465. Department Two. May 2, 1911.]

THE STATE OF WASHINGTON, *on the Relation of George R. Biddle, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*[1]

ASSISTANCE, WRIT OF—MORTGAGES—FORECLOSURE—PARTIES BOUND—PRIVIES. Upon the issuance of a certificate of sale on foreclosure, a writ of assistance may issue against one in possession as receiver in bankruptcy of the estate of the defendant, appointed pending the suit, although he was not made a party to the action, on the theory that the proceeding is *in rem* and he is bound as in privity with the mortgagor.

APPEAL—RIGHT TO APPEAL—WRIT OF ASSISTANCE—PRIVIES—RECEIVER IN BANKRUPTCY. A receiver in bankruptcy in possession of mortgaged premises may appeal from an order granting a writ of assistance or refusing to vacate it, although he was not a party to the foreclosure suit, since he is in privity with the mortgagor.

PROHIBITION—WHEN LIES—ADEQUATE REMEDY BY APPEAL. Prohibition does not lie to prevent the issuance of a writ of assistance, after a mortgage foreclosure, since there is an adequate remedy by appeal.

Application for a writ of prohibition, filed in the supreme court March 24, 1911, to restrain the superior court for King county, Main, J., from issuing a writ of assistance in foreclosure proceedings. Denied.

Bausman & Kelleher, for relator.

A. A. Booth, for respondent.

CHADWICK, J.—On March 24, 1911, this court, upon petition of the relator, issued an order directing the superior court of King county, Honorable John F. Main, judge, to show cause why a writ of prohibition should not issue, prohibiting and restraining him from issuing a writ of assistance in aid of a decree of foreclosure, rendered by him in a certain case then pending in the superior court of King county,

[1]Reported in 115 Pac. 307.

wherein J. T. Sullivan was plaintiff and H. W. Hawley was defendant.

The foreclosure proceeding was begun on August 18, 1910. The property was sold and bid in by the plaintiff Sullivan, who received a certificate of sale entitling him to the possession thereof. He found George R. Biddle in possession, as trustee in bankruptcy of the estate of H. W. Hawley. A petition in bankruptcy had been filed in July, 1910, and Biddle was appointed as trustee on August 20, and qualified as such on August 24, 1910. Upon this state of facts, the court below issued an order to show cause why a writ of assistance should not run; whereupon, the trustee, Mr. Biddle, came to this court. May 12, 1911, was fixed as the return day upon our order to show cause; and in the meantime, respondent, the superior judge, has appeared and moved to quash the proceeding upon the ground, among others, that the relator has a plain, speedy, and adequate remedy at law—the right of appeal.

The relator seeks to sustain this proceeding upon the theory that, inasmuch as he is in possession and was not made a party to that proceeding, the court cannot now issue a writ commanding him to obey its decree because of a lack of jurisdiction, and that, not having been made a party to the original action, he cannot appeal therein, and is hence forced to the writ of prohibition. We think this position is untenable. The foreclosure was a proceeding *in rem*. The court had jurisdiction of the subject-matter, and the rights of the plaintiff against Hawley and wife, and of all those claiming by, through, or under them, were or might have been adjudicated in that proceeding. If for any reason one asserting an interest in the property was not made a party, he might have been brought in at any stage of the proceedings and his rights adjudicated. The writ of assistance, being a writ in aid of the order or decree of a court of equity, there can be no difference in principle whether the one asserting an interest is brought in as an additional party, before decree or there-

after, on an order to show cause why the decree should not foreclose his asserted right. In either event, he has his day in court, and his right can be as fully adjudicated as if he had been made an original party. The result is the same. If it appear that he is in privity with the mortgagor, the writ will run. If it appear that he is not so in privity, or asserts an independent title, it should be denied; the issuance of the writ resting in the sound discretion of the court, and the test being that, "it will be used only when the right is clear and there is not appearance of equity in the defendant, or where there is not a *bona fide* contest relative to the right of possession." *Hagerman v. Heltzel*, 21 Wash. 444, 58 Pac. 580.

In *Debenture Corporation v. Warren*, 9 Wash. 312, 37 Pac. 451, the court said:

"In our opinion the purchaser was entitled to possession upon demand any time after confirmation of the sale, upon presentation of a certificate from the sheriff, and that such being his right, and it being derived solely from the process of the court, it had jurisdiction to entertain a proceeding in the original action by which such rights could be secured."

So, in the case of *Hagerman v. Heltzel*, the writ was issued in aid of a redemptioner and against one holding under the certificate of sale. Neither of the parties had been a party to the original foreclosure suit, and neither had acquired any interest in the land prior to the sale under the decree. It was there contended that the parties should litigate their differences in an independent proceeding, and it was insisted that it was a deliberate attempt to substitute for the usual action at law a summary process issuing from a court of equity. But this court held that, the parties being each in privity to the original parties to the suit, the proceeding was proper, and entertained an appeal. The right to appeal, however, was not raised in that case; but we may assume that, if the court had been impressed with the fact that it had no jurisdiction, it would have so indicated; instead of holding,

as it did, that its decision did not in any way trench upon the general principle that the, "writ will issue only against parties to the suit or their representatives, or those who come into possession under either of the parties while the suit is pending." In *State ex rel. Montgomery v. Superior Court*, 21 Wash. 564, 58 Pac. 1065, the case of *State ex rel. Hartman v. Superior Court*, 21 Wash. 469, 58 Pac. 572, which is relied on by the petitioner, was distinguished, the court saying:

"The subsequent agreement between herself and her husband was, in legal contemplation, made with full knowledge of the lien of Clerf's judgment, and therein is the present case distinguishable from *State ex rel. Hartman v. Superior Court, supra.*"

We have no hesitation in holding that a trustee in bankruptcy takes with notice of an existing lien. In any event, the proceeding being *in rem*, and the relator having acquired an interest subsequent to the commencement of the foreclosure proceeding, and having been brought before the court by its due process, and in that sense made a party to the original proceeding, he has a right of appeal. "Orders granting or refusing writs of assistance are usually appealable." 2 Ency. Plead. & Prac., 985. Or, if the writ be issued *ex parte*, from an order refusing to vacate it. 4 Cyc. 298. While this rule is not universal, it is nearly so, and is certainly consistent with sound reason and orderly procedure.

Whatever the rights of the parties may be held to be in this or any other proceeding, we are satisfied from the record before us that an appeal lies from the order of the court granting the writ of assistance.

Motion to quash allowed.

DUNBAR, C. J., MORRIS, and CROW, JJ., concur.

[No. 9495. Department Two. May 8, 1911.]

ROBERTSON MORTGAGE COMPANY, *Respondent*, v. W. H. B. THOMAS *et al.*, *Appellants*.[1]

APPEAL — SERVICE OF NOTICE — PARTIES — ASSIGNEE OF PARTY. Where the assignee of one of the defendants was adjudged entitled to a deed of one of the lots involved, he became a party to the suit, upon whom notice of appeal must be served.

APPEAL—SERVICE OF NOTICE—PARTIES—PURCHASER AT SHERIFF'S SALE. A purchaser at a sheriff's sale of property becomes a party of record, upon whom notice of appeal must be served.

APPEAL—DISMISSAL—MOTION—AFFIDAVIT — SERVICE. An affidavit not served at the time of the argument of a motion to dismiss an appeal will not be considered.

SAME—SUFFICIENCY OF AFFIDAVIT. An affidavit that a party received notice of the appeal does not show such service of the notice as is required to give jurisdiction of the appeal.

APPEAL—BOND—NECESSITY. Failure of parties joining in an appeal to give a separate appeal bond within five days is fatal to their appeal.

Appeal from an order of the superior court for King county, Gilliam, J., entered November 16, 1910, confirming a sheriff's sale on the foreclosure of a mortgage. Appeal dismissed.

Shepard & Flett and *Brady & Rummens*, for appellants.

John T. Condon, for respondent.

PER CURIAM.—Motion to dismiss appeal and affirm order appealed from. The order involved in the appeal is one confirming the sale by the sheriff of property under a decree of foreclosure of mortgage, and is made upon three grounds: (1) That no notice of appeal was served on E. W. Howell; (2) that no notice of appeal was served on F. E. Green; and (3) that appellant Dobson, Connor, Gay, and Harley, did not serve or file any appeal bond within the time required by

[1]Reported in 115 Pac. 312.

law. We will notice these contentions in their order.

E. W. Howell was not made a party defendant in the foreclosure proceedings. The court, however, in its decree adjudged him to be entitled to a deed to one of the lots involved in the foreclosure, as assignee of L. E. Campbell, one of the defendants. He thereby became a party to the judgment, and as such there can be no escape from holding that he should have been served with notice of the appeal. He was not so served, and under the established rule of this court, the appeal is, because of such failure, ineffectual for any purpose.

F. E. Green was a purchaser at the sheriff's sale of a portion of the involved property, and as such purchaser, became a party to the record, entitling him to service of notice of appeal, as his interest might have been adverse to that of the other parties to the judgment. He was not so served, and such failure is a fatal defect, invalidating the appeal. *McDonald v. Citizens' Nat. Bank*, 58 Kan. 161, 49 Pac. 595; *Pope v. Amidon*, 6 Kan. App. 398; *Clarkson v. Read*, 15 Gratt. 288; *Requa v. Rea*, 2 Paige Ch. 339; *Wood v. Mann*, 3 Sumner 318; Henderson, Chancery Practice, § 618; Daniell, Chancery Pleading & Practice (6th Am. ed.), p. 1462.

An affidavit is attempted to be filed, in which this party is made to say that he received notice of the appeal. The affidavit was not served at the time of argument, and hence may not be considered; but even if it could be given effect, it does not comply with the statute. He may have received notice of the appeal in many ways. The statute, however, is only complied with by the formal service of notice upon all parties who are entitled thereto.

Appellants Dobson, Connor, Gay, and Harley joined in the notice of appeal given by the other appellants, on December 12, 1910, but gave no bond until after the motion to dismiss had been made, and some four months after notice. This was fatal to their appeal. They could not rely upon the bond as given by the original appellants, and should have given a

separate bond within the five days required by statute. *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316; *Hopkins v. Satsop R. Co.*, 18 Wash. 679, 52 Pac. 349.

The motion, being well taken, is granted, the appeal is dismissed, and the order appealed from affirmed.

[No. 9191. Department One. May 5, 1911.]

MRS. O. I. CONVERSE, *Contestant and Respondent*, v. W. A. MIX *et al.*, *Contestees and Appellants*.[1]

WILLS—EXECUTION—UNDUE INFLUENCE—EVIDENCE — SUFFICIENCY. Undue influence upon the part of a son, to whom the testatrix left the major portion of her estate, is not shown, and findings setting aside the will are unwarranted, where it appears that the contestant, a daughter, had been unable to get along with her mother for many years, infrequent visits usually ended in violent discord, while relations with her sons, who took care of her, especially the favored son, were harmonious and usually affectionate; such conduct on his part not being in law undue influence.

SAME—MENTAL CAPACITY — EVIDENCE — SUFFICIENCY. Mental incapacity of an old lady to make her will is not shown by the fact that she was eccentric in the matter of dress, an ardent woman suffragist, and believed she was being persecuted for her eccentricities, where it appears that she had the business ability and judgment to amass and manage a considerable fortune, and retained her mental faculties until the last.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered March 7, 1910, annulling a will, upon findings in favor of the contestant, after a hearing on the merits before the court without a jury. Reversed.

T. P. & C. C. Gose, for appellants.

Sharpstein & Sharpstein and *Dunphy, Evans & Garrecht*, for respondent.

PER CURIAM.—On January 24, 1909, Anna McC. Mix died in the county of Walla Walla, state of Washington, leaving

[1]Reported in 115 Pac. 305.

estate therein, consisting of real and personal property, and leaving as her sole heirs-at-law two sons and a daughter, each of whom was then over the age of majority. She left a will naming her sons and her daughter as legatees and devisees thereof, devising her real property to them in unequal shares, giving one of the sons the more valuable portion, and naming both of her sons as executors thereof. After the will had been admitted to probate, the daughter began proceedings to revoke the probate of the will, and to have the same adjudged to be not the last will and testament of the deceased, setting forth in her petition as grounds therefor; first, that, at the time of the purported execution of the will, the testatrix was incapable, by reason of mental and physical infirmities, of executing a will; and second, that, at the time of the purported execution of the will, the testatrix was acting under the undue influence of her sons, and particularly the younger son to whom she purported to devise the major portion of her real property.

A hearing was had on the allegations of the petition, which resulted in a finding by the trial court that the "deceased was induced to make, execute, and sign said instrument as and for her last will and testament, and to declare the same to be such last will and testament by the undue influence of" her sons "and especially by that of her son Stonewall Wallace Mix," to whom she had devised the greater portion of her real property; and in an order revoking the probate of the will, and adjudging the same to be not the last will and testament of the deceased. This appeal was taken therefrom.

The ground on which the trial court rested its judgment finds little, if any, support in the evidence. While it is true that the testatrix was aged, and was, during her later years, afflicted with an incurable disease—diabetes—and needed the constant care of some one, and that her sons saw that she was provided with such care, yet there is nothing to show that there was anything other than natural affection that induced her to make her will in their behalf. On the other

hand, there are abundant reasons shown why she might not have the same regard for her daughter. The daughter married an army officer in 1866. From that time up until the time of her mother's death, she visited with her mother but five different times; and these visits were of but short duration, usually ending in some violent discord which left them both in a very unhappy frame of mind. The last of these visits was made some four years before the mother's death. At the solicitation of her brothers, the sister came to her mother's home at Walla Walla for the purpose of caring for her during her declining years. She had been in the house but a few days until she began agitating taking proceedings to have her mother placed in a sanitarium, and a guardian appointed over her property. When information of this reached the mother, the usual ruction took place; the daughter left the house for her own home, and let the duty of looking to the mother's comfort fall again upon the sons. One of these sons had been her favorite from his babyhood. His conduct towards her during his whole life seems to have been uniformly courteous and kind. While she had troubles at different times with her other son, and with her daughter whenever they met, her relations with this son were always harmonious, and of a character unusually affectionate, even for mother and son. It is not surprising nor unnatural, therefore, that she should make him the object of her greatest bounty. And while her affection for this son may have influenced her to remember him in her will to the partial exclusion of her other son and her daughter, it is not that character of influence that is classed by the law as undue influence, or that character of influence that authorizes the courts to vacate and hold for naught last wills and testaments. In the language of the supreme court of Kansas in *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024:

"To vitiate a will there must be more than influence. It must be undue influence. To be classed as undue, influence must place the testator in the attitude of saying, 'It is not my

will, but I must do it.' He must act under such coercion, compulsion, or constraint that his own free agency is destroyed. The will, or the provision assailed, does not truly proceed from him. He becomes the tutored instrument of a dominating mind which dictates to him what he shall do, compels him to adopt its will instead of exercising his own, and by overcoming his power of resistance impels him to do what he would not have done had he been free from its control. A testator's favor expressed in a will may be won by devoted attachment, self-sacrificing kindness, and the beneficient ministrations of friendship and love. These influences are not undue. We expect partiality to attend them. They bring preferment as their natural reward, and they do not become unrighteous, although they establish a general ascendency over the testator leading him to find comfort and pleasure in gratifying the wishes and desires of the person exercising them. Other less worthy influences may make equally strong appeals and may result in the same general dominion and still be sufferable in contemplation of the law. Influences to induce testamentary disposition may be specific and direct without becoming undue. It is not improper to advise, to persuade, to solicit, to importune, to entreat, and to implore. Hopes and fears and even prejudices may be moved. Appeals may be made to vanity and to pride; to the sense of justice and to the obligations of duty; to ties of friendship, of affection, and of kindred; to the sentiment of gratitude; to pity for distress and destitution. It is not enough that the testator's convictions be brought into harmony with that of another by such means. His views may be radically changed, but so long as he is not overborne and rendered incapable of acting finally upon his own motives, so long as he remains a free agent, his choice of a course is his own choice, and the will is his will and not that of another."

The contestant's learned counsel, however, in their argument before this court, attempt to support the judgment of the court below on the ground of mental incapacity in the testatrix, rather than upon the ground on which it was rested by the trial judge. But we think the evidence equally fails to support this theory. It is true, it is made clear that the testatrix was in many ways eccentric, particularly in the

matter of dress. It was shown, also, that at one time she was an ardent woman suffragist, and persuaded herself that she was being persecuted by the people of the city in which she lived because thereof, and because of her dress, her "music, and all that pertained to the refinement of" her home. Her manner of dress, the evidence shows, was somewhat peculiar, and no doubt did cause her neighbors to avoid her socially, and did keep them from inviting her into their homes, and these facts no doubt led her to think she was being persecuted by them. But these complaints were made in the earlier part of her life, and can hardly be said to have much bearing on her sanity at the time the will was executed. Her eccentricities followed her throughout her life, but nevertheless seem not to have interfered with her business ability and judgment. Left a widow in the middle period of her life, with an inconsiderable property and a considerable debt, she succeeded, in the space of perhaps a quarter of a century, in not only paying off the debt, but in amassing a considerable fortune in income-bearing real estate; and this, notwithstanding her eccentricities. Since her eccentricities did not interfere with her accumulation of the property, we do not feel that they should incapacitate her to will it away. Nor did her mental faculties fail until the last. For a considerable period after the execution of the will in question here, and indeed, up until a short period prior to her death, she kept her business matters within her own hands; supervising the action of her agent in renting her properties and collecting the rents therefrom, and keeping charge of her household expenses, not even permitting her sons to supervise the latter.

But without pursuing the question further, the judgment and order appealed from will be reversed, and the cause remanded to reinstate the will and proceed with the administration of the estate, in accordance therewith.

[No. 9346. *En Banc.* May 8, 1911.]

JOSH R. MCINTYRE, *Appellant*, v. E. W. JOHNSTON *et al.*, *Respondents*.[1]

PARTNERSHIP—ACCOUNTING—PARTNERSHIP PROPERTY — EVIDENCE—SUFFICIENCY—LACHES. In an action for a partnership accounting, an indefinite agreement for partnership relations respecting the operation of a boat to be owned equally by the parties, the hull of which was furnished by plaintiff and the engines and principal part of the expenses by the defendant, is not sufficient to create a partnership in two other boats, thereafter acquired by the defendant, in which the engines of the old boat were installed, where it appears that the partnership operations had been discontinued for a year, the plaintiff taking the hull of the old boat and the defendant the engines, that the defendant used and exercised full control over the new boats, and the plaintiff took the hull of the old one, and later stored and did work for the defendant on the new boats, charging defendant full value for such storage and service, and made no claim to an interest therein for seven years.

PARTNERSHIP—ACCOUNTING—CONDITIONAL SALE OF PROPERTY—TITLE—EVIDENCE FOR ACCOUNTING—SUFFICIENCY. A partnership accounting for a half interest in a mining claim, alleged to have been acquired by defendant in a trade for a partnership boat, is properly denied, where it appears that the partnership relations had been discontinued, that the boat and claim were considered only of nominal value, the claim being offered to defendant for $150, and that he agreed to take the boat back and pay $150 in case the vendee could not make it run, which defendant did long before the mining claim was found to be of value; since the boat was only conditionally sold, the title thereto did not pass, and it did not form the consideration for the claim.

APPEAL — REVIEW — TRIAL — FINDINGS—WHAT CONSTITUTES—NECESSITY OF EXCEPTIONS. Where the trial court, in dismissing an equitable action, refused to make specific findings of fact and conclusions of law, it is not necessary, in order to secure a review on appeal, to take exceptions to an oral opinion rendered at some length, which the court stated could be written out by the stenographer and considered as findings, where it contained only informal statements that did not cover the controversy.

PARTNERSHIP—ACCOUNTING — DEFENSES — LACHES. The lapse of seven years, after the abandonment of a partnership, and the con-

[1]Reported in 115 Pac. 509.

tinued exclusive use for that time of some of the property by the partner who had furnished most of the money, may be sufficient to bar an action for an accounting by the other partner.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered October 18, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for an accounting. Affirmed.

Jay C. Allen and *Blaine, Tucker & Hyland*, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondents.

PER CURIAM.—This is a suit for a partnership accounting. It is prosecuted by the plaintiff upon the theory that there was a partnership formed between him and the defendant E. W. Johnston, in the year 1901, for the purpose of conducting a towing business at Nome, Alaska, and that one of the small boats constituting a part of the partnership property was traded by Johnston for a certain placer mining claim situated near Nome, in the summer of 1904, resulting in the claim becoming the property of the partnership. While the suit was for a general partnership accounting, there is, as we understand the controversy, nothing here involved but the right of the plaintiff to an accounting from the defendant for a one-half interest in the claim, or rather the proceeds thereof. From a decree denying the relief prayed for, the plaintiff has appealed.

In the spring of 1901, appellant owned the hull of a small boat at Tacoma, in which he proposed placing power, fitting it for use as a tow boat at Nome. At that time he entered into an arrangement with Johnston by which Johnston was to furnish the means for installing the power in the boat, consisting of two gasoline engines, and also means for the transportation of the boat to Nome. By this arrangement Johnston was also to furnish means for the transportation of appellant and his family to Nome. Johnston was not to

be actively engaged in the operation of the boat, but its operation was to be carried on by appellant, who was to be paid a salary therefor from the earnings of the boat before the division of any profits. When the boat arrived at Nome ready for its proposed use in the summer of 1901, Johnston had advanced means towards the enterprise a great deal more in amount than appellant had, and it was understood that Johnston should be repaid the excess he had put into the enterprise over what appellant had put in. This excess was first to be repaid to Johnston from the net earnings of the boat, and thereafter the net earnings were to be divided equally between appellant and Johnston, and each was to be considered as owning equal shares in the boat. This understanding was not reduced to writing, and was loosely entered into. Some contention is made that the arrangement then entered into did not in law amount to a partnership agreement. We will not attempt to solve that problem, nor have we attempted to state what the understanding of the parties was with any great degree of accuracy, but will assume that they did then enter into partnership relations substantially upon the terms we have indicated.

Upon appellant's attempting to operate the boat at Nome it proved to be practically worthless for the purpose intended, and it was unable to earn anything of any consequence. Indeed, it is very doubtful as to whether or not it ever earned sufficient to pay the expense of operation. In July, 1901, the boat ceased to be used in the partnership business, both appellant and Johnston assenting thereto. Thereafter there was acquired, at the expense of Johnston, two other small boats, in each of which was placed one of the engines taken from the first boat. The installing of these engines was also done at Johnston's expense. The boats were given the names of "Pup No. 1," and "Pup No. 2." The earning power of these boats proved no better than that of the first boat. In the fall of 1901, one of these boats was tied to a schooner anchored at Nome, and during a storm the schooner was

obliged to put to sea, carrying the small boat with her. This small boat eventually fell into the hands of a United States marshal at Dutch Harbor and was sold. The following spring, 1902, Johnston recovered this boat at Dutch Harbor while on his way north from Seattle to Nome, put it on board ship, and carried it back to Nome. It might well be argued that the circumstances under which he recovered this boat resulted in its becoming his property, regardless of any partnership relations between him and appellant. In any event the recovery of the boat was accomplished at considerable expense and added to the amount of the investment Johnston had in the boats. Later one of these boats was burned on the beach some distance from Nome, and thereafter her engine was recovered by Johnston.

It seems clear that there was no pretense of carrying on the business contemplated by the partnership agreement after the summer of 1901, or in any event not after the summer of 1902. Johnston seems to have exercised entire control and ownership over the two Pup boats after that, and appellant seems to have exercised ownership over the hull of the first boat, at least it was stored close to his place of business at Nome, and was later sold by his representative there and no account made therefor to Johnston; neither has Johnston ever accounted to appellant for the Pup boats. There does not seem to have been any formal accounting of the partnership affairs nor any formal agreement for division of the partnership property. It seems highly probable from the record that Johnston has at all times had considerably more invested in the enterprise than appellant. In the fall of 1901, appellant appears to have been conducting a storage business at Nome, and he then received for storage from Johnston one dynamo and one box of tools, part of the apparel of one or the other of these Pup boats. He gave Johnston a receipt for these, indicating that he regarded them as Johnston's property. In the summer of 1902, appellant, with a partner, was conducting a machinery and storage business at

Nome under the name of Josh R. McIntyre & Company. They then performed mechanical work upon one, or possibly both, of these Pup boats for which appellant collected from Johnston the entire amount charged therefor, amounting to $141.38, appellant receipting payment therefor in his own name. These are among the circumstances indicating the termination of partnership relations between appellant and Johnston, and that appellant regarded Johnston as the owner of the Pup boats.

In the summer of 1904, Johnston was offered the mining claim in question for $150. There is some controversy as to who offered the claim to Johnston, and as to who negotiated the deal with him by which he acquired title to the claim in the name of his wife. However this may be, it is plain that whoever Johnston made this deal with had the authority to do so, either as the owner or representative of the owners of the claim. Johnston testified to the bargain then made, relative to the consideration for the claim and the return of the boat, as follows:

"Q. At the time you made the trade of the Pup for the mining claim, or the interest in the mining claim, explain to the court the conditions under which the trade was made and what guarantee you had to give, if any, pertaining to the boat? A. They wanted $150 for the claim, and then we got talking about the boat, and I said, 'I will trade you the boat for the claim,' and they thought that they were not sure if they could make it run, and I said, 'If you want to make the deal you can, and if you cannot make the boat run, bring it back and I will give you $150 for it,' and a short time after, they came back and asked if I would stand by my bargain, and I said 'I have to, cannot you make it run' and they wanted to know if I would stand by my word, and Maynard tried it. That was sometime in the fall of 1904, and when I came in, in the spring of 1905 Maynard came to me, and said, 'I have that boat here' and I paid him $150 and took the boat. Q. Did you fulfill your guaranty to take the boat back if they could not make it operate? Did you give them $150? A. I did. Q. When did you give him the $150 for the boat back? A. Sometime in 1905, I think

in July or August. Q. Before or after gold was struck on this claim? A. Long before."

At the time of acquiring the claim it was plain that neither it nor the boat was regarded as of any more than nominal value. No gold had been taken from the claim nor was there any prospect that there would be. The boat had been little else than a failure and was valued by Johnston and his wife accordingly. When the boat was taken back by Johnston neither it nor the claim had any apparent different value than at the time the deal was originally made. This boat has remained in Johnston's possession ever since he took it back and paid the $150. There was some effort to make it appear that Johnston bought the boat back for use in his business, without reference to any agreement he had made to take it back at the time of acquiring the claim. We think, however, that the testimony of Johnston above quoted stands practically uncontradicted. At the time he took the boat and paid the $150 there was no apparent reason for him seeking to prevent the boat becoming the consideration for the claim. Gold was not discovered upon the claim so as to render it of apparently any greater value than when Johnston first acquired it until long after the return of the boat. We think the record furnishes no reason for doubting that the boat was conditionally traded for the claim, as testified to by Johnston. We have given no attention to the question of the claim being Mrs. Johnston's separate property. This suit was commenced in March, 1909, about seven years after the partnership had ceased to do business, during all of which time no accounting was made by either appellant or Johnston.

It seems clear to us that, so far as any accounting by Johnston to appellant for the claim or the proceeds thereof is concerned, the decree of the trial court must be sustained upon the ground that the boat never became the consideration for the claim, even assuming that the boat was partnership property at the time of acquiring the claim. The trade of the boat for the claim was nothing more than a sale of the

boat upon trial or approval; and it having been returned in compliance with the original agreement, its title never passed from Johnston. The rule governing such a transaction is stated at 35 Cyc. 289, as follows:

"A sale on trial or approval is in the nature of an option to purchase the goods if they prove to be satisfactory, or a sale upon condition precedent, and its operation as regards the transfer of title is to be distinguished from what is commonly known as a sale or return. Where goods are sold on trial or approval or if satisfactory to the buyer the contract is executory, and the property in the goods does not pass until the buyer has expressly or impliedly manifested his approval or acceptance, unless a different intention appears; but acceptance and approval to pass title in the goods may be express, or may be implied from the conduct of the buyer, as by his failure to reject and return the goods."

In Benjamin on Sales (Bennett's 7th ed.), at p. 606, the rule is stated as follows:

"In sales on trial, or a delivery with a right to buy if one likes, the party has a reasonable time for trial, if none is expressly mentioned, and until that time, or the expiration of the limited time, the title and risk is in the vendor."

This doctrine is supported by abundant authority.

Some contention is made that we ought not to conclude that the title of the boat did not pass from Johnston, because the trial court found otherwise and no proper exception was taken to such finding. When the cause was submitted to the court after argument, the trial judge rendered an oral opinion of considerable length in which he reviewed the history of the relations of these parties in an informal manner. There were no specific findings of fact or conclusions of law stated separately. At that time counsel asked for findings to be made. This the judge declined to do, and at the conclusion of his oral opinion, stated that his remarks could be written out by the stenographer and filed in the case and considered as the findings. This was done later, and thereafter some

exceptions were taken thereto by respondents' counsel, which it is claimed were not taken within the statutory time. The nearest to a finding upon this question was an informal statement by the judge which was in keeping with the balance of his oral opinion, as follows:

"And then came the following really romantic somewhat strange circumstances that have happened for the last century in the mining camps of every western country—the trade for boat—the boat that was lying there worthless, a piece of junk, and Captain Johnston traded the boat for the mine. I do not think that Captain Johnston gave a single moment's thought to whether McIntyre had any interest in the boat or not. I don't think he cared. The man who had the mine said 'The mine is no good,' and Johnston said in reply, 'The boat is no good, so we are even so far as that is concerned.' But the trade was made. I presume Captain Johnston looked at the boat as a sort of hoodoo and was more than pleased to get rid of it. In the meantime McIntyre had left there and came down to Seattle. I think that McIntyre, when he came down here, gave up all thought of and absolutely abandoned—I do not know any better word to use in connection with it—absolutely abandoned any idea of claiming any interest whatever in any of that property."

We do not regard this as a specific finding of the nature of the contract entered into which resulted in the acquiring of the claim. It no way negatives the fact that this trade of the boat was conditional. Aside from this, we do not think that an informal opinion, rendered, as this was, in a case of purely equitable cognizance, calls for exceptions to statements made therein. Had there been formal findings of fact and conclusions of law covering the controversy, there might be some reason for contending that we ought not to look beyond the findings not excepted to. We therefore think it was immaterial as to whether or not exceptions were taken by counsel for respondent to the statements made in the court's opinion.

The trial court apparently denied the relief prayed for upon the ground that the partnership was abandoned about

1902, and that while there had been no formal settlement of the partnership business nor any specific agreement as to a division of the partnership property, the lapse of time since the abandonment of the partnership business and the assumption of ownership by Johnston of the Pup boats preclude a recovery by appellant. Since the decree denying the relief prayed for seems to us so clearly sustainable upon the ground that the boat never became the consideration for the claim, we deem it unnecessary to discuss other questions; though we think the ground upon which the trial court based its decision is also sufficient to prevent appellant's recovery. The decree is affirmed.

[No. 9180. Department One. May 10, 1911.]

CALISPEL DIKING DISTRICT NO. 1 OF STEVENS COUNTY, *Respondent*, v. F. H. McLEISH *et al.*, *Appellants*.[1]

EMINENT DOMAIN—DRAINS — APPEAL — REVIEW — QUESTIONS REVIEWABLE. Under Rem. & Bal. Code, § 4107, providing that an appeal from any judgment of damages or any assessment of benefits in condemnations for dikes shall bring before the supreme court the propriety and justness of the amount of damages or assessment, errors going to the validity of the organization of the district or regularity of the proceedings leading up to the judgment of condemnation cannot be considered on appeal from the final judgment.

Appeal from judgments and orders of the superior court for Stevens county, Carey, J., entered March 7, 1910, awarding damages and confirming assessments levied to pay therefor, in proceedings to condemn land for a system of dikes. Affirmed.

Skuse & Morrill, for appellants.

R. L. Edmiston, for respondent.

FULLERTON, J.—In the latter part of the year 1908, certain freeholders residing in a portion of Stevens county re-

[1]Reported in 115 Pac. 508.

quiring diking organized a diking district composed of such territory and elected three "dike commissioners" to manage the affairs of the district, pursuant to the act of March 20, 1895, and the act amendatory thereof. Rem. & Bal. Code, § 4091 *et seq.* Thereafter the dike commissioners began proceedings looking to the construction of a system of dikes. To that end they filed a petition in the superior court of Stevens county praying for the condemnation and appropriation of a right of way for a dike, and for an assessment upon the lands benefited by the construction of the dike to pay for the right of way and the costs of such construction. All of the property holders of the district were made parties to the proceedings and duly served with summons, and such proceedings were thereafter had as to result in a judgment of condemnation of a right of way for the construction of a dike and an assessment upon the property within the district benefited by the improvement to pay the value thereof and the costs of constructing the dike. From these orders and judgments, F. H. McLeish and Charlotte McLeish, Henry Bauer and Frank Winchester, freeholders residing within the diking district and having property affected by the construction of the dike, gave notice of appeal, the body of which was as follows:

"You and each of you, are hereby notified that the above named defendants, F. H. McLeish, Charlotte McLeish, Frank Winchester and Henry Bauer, appeal to the supreme court of the state of Washington from that certain order of the court made and entered in the above entitled cause on the 7th day of March, 1910, and from the whole thereof, and also appeal from that certain judgment made and entered in the above entitled cause on the 12th day of March, 1910, and from the whole thereof."

The appellants do not claim, either in their assignments of error or in the arguments made in support of their appeal, to be aggrieved by the judgment for damages made in their favor or by the assessments made upon their property, but confine their assignments of error and arguments to ques-

tions going to the validity of the organization of the district and to the regularity of the proceedings which led up to the judgment of condemnation and the assessment of benefits. The respondent contends that these questions cannot be brought to this court by an appeal from the judgment of condemnation and the judgment confirming the assessment of benefits, but insists that they must be brought before this court by a writ of review, if the questions are reviewable at all; arguing that an appeal only brings before the court the "justness of the amount of damage or the assessment of benefits in respect to the parties to the appeal."

It is our opinion that this objection is well taken. The provision of the diking statutes relating to appeals reads as follows:

"Every person or corporation feeling himself or itself aggrieved by any judgment for damages or any assessment of benefits provided in this chapter, may appeal to the supreme court of the state within thirty days after the entry of the judgment, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages or assessment of benefit in respect to the parties to the appeal. Upon such appeal no bonds shall be required and no stay shall be allowed." Rem. & Bal. Code, § 4107.

In *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, we held that a similar provision in the general statute relating to condemnation proceedings allowed an appeal only from the "propriety and justness of the amount of damages in respect to the parties to the appeal;" holding that the general statute of appeals had no application for the reason that the condemnation statute was a special statute, and since the legislature had allowed only a limited appeal therefrom, it was equivalent to a denial of the applicability of the broader provisions of the general statute. Had the appeal been taken from the award of damages or the amount of the assessment, or had some question been made concerning them, the court perhaps would have reviewed, under the authority of the cases of *State ex rel. McCormick v. Superior*

Court, 43 Wash. 91, 86 Pac. 205, and *State ex rel. Port Townsend Southern R. Co. v. Superior Court*, 44 Wash. 554, 87 Pac. 814, the question involved in the immediate procedure by which the damages were ascertained, but since the only question sought to be raised goes to the validity of the proceedings affecting the organization of the diking district and the judgment of condemnation, they are not reviewable on appeal.

The judgments and orders sought to be appealed from will therefore stand affirmed.

DUNBAR, C. J., MOUNT, PARKER, and GOSE, JJ., concur.

[No. 9192. Department One. May 10, 1911.]

H. B. STRAND *et al.*, *Appellants*, v. J. M. GRIFFITH *et al.*, *Respondents*.[1]

CONSTITUTIONAL LAW — IMPAIRING OBLIGATIONS OF CONTRACTS — MORTGAGES—FORECLOSURE — POSSESSION — REMEDIES. A statute relative to mortgage foreclosure sales is unconstitutional as to existing mortgages as impairing the obligation of the contract, in so far as it requires the sheriff to postpone the sale for one year and gives the mortgagor possession of the premises during that time, when the former law gave the mortgagee the right to an immediate sale with the right of possession during the period of redemption; but the law is valid in changing the requirements as to the notices of sale; since that merely affects the remedy and not the obligation of the contract.

MORTGAGES—FORECLOSURE—SALES—IRREGULARITIES—CONFIRMATION. Failure to publish notice of a mortgage foreclosure sale in the exact manner required by law is an irregularity only, and does not render the sale so far void that it is not curable by the order of confirmation.

MORTGAGES—FORECLOSURE—SALE—ACTION TO SET ASIDE—LACHES. A delay of nine years in bringing suit to cancel a mortgage foreclosure sale, without any excuse, is such laches as to justify the denial of relief on any ground other than the actual invalidity of the sale.

[1]Reported in 115 Pac. 512.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered March 26, 1910, upon sustaining a demurrer to the complaint, dismissing an action to vacate a foreclosure sale. Affirmed.

Blaine, Tucker & Hyland, for appellants.

Hadley, Hadley & Abbott and *Dorr & Hadley*, for respondents.

FULLERTON, J.—On February 15, 1897, the appellants, who are husband and wife, executed and delivered to the respondent J. M. Griffith a mortgage upon certain real property situated in Whatcom county, to secure the payment of the sum of $4,800, with interest, six months from date. The debt evidenced by the mortgage was not paid at maturity, and proceedings were instituted to foreclose the same on November 3, 1897. Summons on the complaint was duly issued and served, and the cause proceeded regularly to a decree of foreclosure, which was entered on February 5, 1898. On February 24, 1898, some nineteen days after the entry of the decree, an execution and order of sale was issued thereon, under which the sheriff of the county in which the land is situated sold the land to the mortgagee, he being the highest and best bidder therefor at the foreclosure sale. In making the sale, the sheriff followed the procedure mapped out by the statute relating to foreclosure sales in existence at the time the mortgage was executed. That statute provided, in substance, that a decree of foreclosure should be enforced by execution directed to the sheriff, that the execution should contain a description of the mortgaged property, and that the sheriff should endorse upon it the time when he receives it, and should thereupon forthwith proceed to sell the mortgaged premises, or so much thereof as might be necessary to satisfy the decree, after giving notice of such sale by posting a written or printed notice of the time and place of sale, particularly describing the property, for four weeks succes-

sively in three public places of the county where the property is to be sold, and by publishing a copy thereof once a week for the same period in a newspaper of the county, if there be one, or if there be none, then in a newspaper published nearest the place of sale.

Due return of the sale was made by the sheriff on March 29, 1898, and the sale was confirmed on April 30, 1898. A sheriff's deed to the purchaser followed in due order. In the meantime, however, that is to say, between the time of the execution of the mortgage and the commencement of the foreclosure proceedings, the legislature made certain radical changes in the law relative to sales of property under decrees of foreclosure and executions on ordinary money judgments. It provided that, on receiving the writ of execution, the sheriff should endorse thereon, or attach thereto, a description of the property to be sold; that he should file with the clerk of the court where the property is situated, and with the clerk of the court issuing the writ, a copy of the writ with such description attached to or endorsed thereon; that one year after the time of filing such levy he should give notice that the property levied upon would be sold at public auction in satisfaction of the judgment, by posting notices of such sale in three public places in the county where the sale is to be made, one of which should be in a conspicuous place on the property to be sold, four weeks prior to date of sale, and by publishing a copy thereof once a week for the same period in the official paper of the county, or if there be none, then in a newspaper published nearest the place of sale. It was provided, moreover, that no sale could be had at all until after the land had been appraised, and that at the sale the land must bring, if capable of division, at least eighty per cent of its appraised value, Other conditions were also provided, not necessary here to notice.

The present action was begun in July, 1907, by the mortgage debtors to set aside the sale made by the sheriff. To a complaint embodying the foregoing facts, the several de-

fendants separately demurred, which demurrer was on a hearing sustained by the trial court. This appeal is from a judgment of dismissal and for costs, entered against the plaintiffs after they had elected to stand on their complaint and had refused to plead further.

The question presented by the record; namely, which of these statutes was the sheriff obligated to follow in conducting the sale, was before this court as to some of its features in the case of *Swinburne v. Mills*, 17 Wash. 611, 50 Pac. 489, 61 Am. St. 932. It was there held that the provisions of the later statute to the effect that the sheriff must, after levying upon the land to be sold, delay the sale for one year and cause an appraisement of the land before such sale, were not applicable to a case such as the one now at bar, where the mortgage was executed prior to the enactment of the statute, for the reason that it impaired the obligation of the mortgage contract. Concerning this question the court said:

"This brings us then to the third proposition, viz.: Is the act unconstitutional so far as its application to contracts made prior to the passage of the act is concerned? It will thus be seen that this case involves the principle of inviolability of contracts. This principle the courts have always protected, no matter from what quarter, or under what guise, it has been assailed, whether by a party to the contract, who has sought to vary its terms, or by legislative enactments in his interests. It is a principle which is founded upon honesty and good faith, and finds its support in ethics as well as law, and it was recognized and enforced before it became a constitutional guarantee. It gives stability to business transactions. In fact, it makes them possible. It gives value to contracts, and without the upholding of this principle neither civilization nor governments could exist. A contract is an agreement to do or not to do a particular thing. The obligation is the binding force of the contract. The constitution prohibits the passing of laws which impair the obligation of a contract. The practical question then is, What is an impairment of a contract? Webster's definition of 'impair' is, 'To make worse; to diminish in quantity,

value, excellence or strength; to deteriorate.' Then if the value of a contract is deteriorated or lessened by the passage of an act, the obligation of the contract is most certainly impaired. Then the question arises, Was the contract of this mortgagee deteriorated or made less valuable by the passage of this act? It is a principle of law so often enunciated and so uniformly maintained that the law which is in existence at the time a contract is made becomes a part of the contract, that it would be idle to cite authorities on that proposition, or to further mention it. In this case it is especially stipulated in the mortgage that the laws in force at the time the contract was made should become a part of the contract, but in the absence of such stipulation the effect would be exactly the same. Under the law in existence at the time the contract was made, the mortgagee had a right to the sale of this land at once upon the issuance of his execution, subject only to the redemption provided for by law. This was a valuable right and a right no doubt that was taken into consideration by the judgment creditor, or, in this case, the mortgagee, when the contract was made. The law now compels him to wait more than a year after judgment before he can have the sale made. It seems to us to be beyond controversy that, as to antecedent contracts, this provision of the law is void."

Further on in the opinion the court cited and quoted from a number of cases from the supreme court of the United States, showing that the question was one of Federal cognizance, and that the highest Federal court had announced a similar rule. In the light of these cases, therefore, there can be no question that the sheriff was justified in selling the property under the execution without the delay of a year and without having the land appraised.

But while the courts deny the power of the legislature to make such radical changes in the remedy for enforcing a contract as to impair its obligation, they are agreed that whatever belongs merely to the remedy and does not affect the obligation of the contract can be changed at the pleasure of the legislature. So in this instance it was perfectly proper for the legislature to require on a foreclosure sale that one of

the notices thereof be posted in a public place on the land to be sold, and that copies of such notices be published in the county official paper if there be one, although the law in force at the time the contract was entered into allowed such notices to be posted in three public places in the county generally, regardless of the location of the land, and allowed copies thereof to be published in any paper published in the county where the land was situated, regardless of the question whether such paper was the county official paper or not. In the case at bar it is alleged that no one of the notices of sale was posted on the land, nor was a copy thereof published in the county official paper; and the question is presented whether these omissions avoid the sale. It is our opinion that they do not. While the omissions may have rendered the sale so far irregular as to have warranted the court in refusing to confirm the sale, we do not think they rendered the sale so far void as to be incurable by the order of confirmation. Moreover, this action was begun, as will be noticed from the dates given, more than nine years after the sale took place, and no reason is shown why it could not have been prosecuted at any time during that period. On the ground of laches alone the court would be justified in denying relief on any ground other than the actual invalidity of the sale.

The judgment is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9291. *En Banc.* May 10, 1911.]

ELIZA W. P. GUYE, *Appellant*, v. JOHN W. GUYE *et al.*, *Respondents.*[1]

HUSBAND AND WIFE—COMMON PROPERTY—INCOME—STATUTES. The common property act of 1871, providing that the income or proceeds of the separate property of both husband and wife accruing during marriage shall be common property, did not impress separate property with a trust in favor of the common use of both, in view of other provisions of the act giving each the sole control, management, and power of disposition of their separate estates; but simply provides that the income thereof, when it comes into existence, shall be common property.

SAME—STATUTES—CHANGE OF STATUS. The common property act of 1871, having provided that the income of separate property should be common property, the legislature would not have power by a subsequent act to declare income already accrued to be separate property, but it could so provide as to future income.

SAME — INCOME OF COMMON PROPERTY—"INTEREST." The provision in the common property act of 1871, relating to both personal and real property, that the rents, profits, "interest" and income of separate property shall be common property, means only that the entire income thereof shall be common property, "interest" not having any further significance.

HUSBAND AND WIFE — COMMUNITY PROPERTY — ACQUIRED AFTER MARRIAGE—ENHANCEMENT IN VALUE. The natural enhancement in value during marriage of the separate property of the spouses is not property acquired during marriage, within the spirit of the community property statutes, which provides that property acquired before marriage and in certain ways, together with the rents, issues, and profits thereof, shall be the separate property of the spouse acquiring it, and that all other property acquired after marriage shall be community property.

SAME—PURCHASE BEFORE MARRIAGE. Where the husband purchased land, took possession, made improvements, and paid at least part of the purchase price before marriage, it is his separate property, although he received the deed after marriage, in the absence of a showing that community funds entered into the purchase.

SAME—TAXES ON SEPARATE PROPERTY—PRESUMPTIONS. Where the husband has separate income, it cannot be presumed that the taxes

[1]Reported in 115 Pac. 731.

on his separate property during marriage were paid with community funds.

SAME—CONTINUANCE OF STATUS—PRESUMPTIONS. It will be presumed that property once shown to be separate property continued to be such until the contrary is made to appear.

SAME—EVIDENCE—WIFE JOINING IN MORTGAGE. The joinder of a husband and wife in a mortgage of real estate is not evidence that the property was community property.

SAME—COAL LAND ENTRIES. Lands acquired under coal land entries by a husband are his separate property, in view of the act providing that each spouse may make an entry and acquire title, that the entryman must swear that the entry is made for his own benefit and not directly or indirectly for the benefit of any other person, and requiring no residence on the land.

SAME—MINING CLAIMS. Mining claims acquired by a husband are his separate property, in view of the act permitting either spouse to make entry and acquire full title from the United States without the aid or intervention of the other.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 19, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title and for partition. Affirmed.

Blaine, Tucker & Hyland, for appellant, contended, among other things, that the interest of the wife under the common property law was a fixed interest. Cooley, Constitutional Limitations (7th ed.), p. 513; *Rose v. Rose*, 104 Ky. 48, 46 S. W. 524, 84 Am. St. 430, 41 L. R. A. 353; *Rose v. Sanderson*, 38 Ill. 247; *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172; *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; *Jenney v. Gray*, 5 Ohio St. 45; *White v. White*, 5 Barb. 474; *Holmes v. Holmes*, 4 Barb. 295; *Herhizer v. Florence*, 39 Ohio St. 516; *Lessee of Thompson's Heirs v. Green*, 4 Ohio St. 217; *Clark v. Clark*, 20 Ohio St. 128; *Lemon v. Waterman*, 2 Wash. Ter. 485, 7 Pac. 899; *Criscoe v. Hambrick*, 47 Ark. 235, 1 S. W. 150; *Bachman v. Chrisman*, 23 Pa. 162; *Burson's Appeal*, 22 Pa. 164; *Dunn v. Sargent*, 101 Mass. 337; *Westervelt v. Gregg*, 12 N. Y. 202, 62

Am. Dec. 160; *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618; *Mitchell v. Violett*, 104 Ky. 77, 47 S. W. 195.

Higgins, Hall & Halverstadt and *Morris, Southard & Shipley*, for respondents, contended, *inter alia*, that if either spouse, prior to marriage, acquires an equitable interest in real estate, the property is separate, irrespective of the date of acquisition of the legal title. 6 Am. & Eng. Ency. Law (2d ed.), p. 325; McKay, Community Property, pp. 60-114; *McDougal v. Bradford*, 80 Tex. 558, 16 S. W. 619; *Gardner v. Burkhart*, 4 Tex. Civ. App. 590, 23 S. W. 709; *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281; *Texas & N. O. R. Co. v. Speights* (Tex. Civ. App.), 59 S. W. 572, 1 Tex. Ct. Rep. 513; *Hillen v. Williams*, 25 Tex. Civ. App. 268, 60 S. W. 997; *Alford Bros. & Whitesides v. Williams*, 41 Tex. Civ. App. 436, 91 S. W. 636; *Lake v. Lake*, 52 Cal. 428; *Morgan v. Lones*, 80 Cal. 317, 22 Pac. 253; *In re Boddy's Estate*, 119 Cal. 402, 51 Pac. 634; *In re Pepper's Estate*, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092; *Barbet v. Langlois*, 5 La. Ann. 213; *Woodward v. Davidson*, 150 Fed. 840; *Davidson v. Woodward*, 156 Fed. 915; *Landes v. Brant*, 10 How. 348; *Stark v. Starrs*, 6 Wall. 402; *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321; *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. 912; *Rogers v. Minneapolis Threshing Machine Co.*, 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014. Appellant's rights to rents from her husband's separate estate, under the act of 1871, depended upon their accruing during her life and the life of the deceased, a mere expectancy which was subject to the absolute power of the legislature. *Alexander v. Alexander*, 85 Va. 353, 1 S. E. 335, 1 L. R. A. 125; *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976; *Percy v. Cockrill*, 53 Fed. 872; *Rugh v. Ottenheimer*, 6 Ore. 231, 25 Am. Rep. 513; *Niles v. Hall*, 64 Vt. 453, 25 Atl. 479; *Randall v. Kreiger*, 23 Wall. 137; *Allen v. Hanks*, 136 U. S. 300; *Stephens v. Cherokee Nation*, 174 U. S. 445;

Marley v. Lake Shore & Michigan S. R. Co., 146 U. S. 162; *Taylor v. Taylor*, 12 Lea 490; *Baker's Ex'rs v. Kilgore*, 145 U. S. 487. Mining claims are by force of Federal statutes separate property of the locator perfecting title thereto. Morrison, Mining Rights (12th ed.), p. 124; Barringer & Adams, Law of Mines & Mining, p. 388; 1 Lindley, Mines, §§ 169, 324, 535, 539; *O'Connel v. Pinnacle Gold Mines Co.*, 140 Fed. 854; *120 Mining Co. v. Bullion Min. Co.*, 3 Sawyer 634; *Eureka Consol. Min. Co. v. Richmon Min. Co.*, 4 Sawyer 302; *Talbott v. King*, 6 Mont. 76; *Kahn v. Old Telegraph Min. Co.*, 2 Utah 174; *Forbes v. Gracey*, 94 U. S. 762; *Bradford v. Morrison*, 212 U. S. 389; *Elder v. Horseshoe Min. & Milling Co.*, 194 U. S. 248; *Elder v. Wood*, 208 U. S. 226; *Clipper Min. Co. v. Eli Min. & Land Co.*, 194 U. S. 220; *Creede etc. Min. Co. v. Uinti etc. Min. & Transp. Co.*, 196 U. S. 337.

FULLERTON, J.—Francis M. Guye and Eliza W. P. Guye intermarried at the city of Seattle on March 21, 1872, and thereafter, until the death of Francis M. Guye on May 25, 1908, lived together as husband and wife. There was no issue of their marriage. Francis M. Guye had been formerly married and was the father of children born of such marriage. At the time of his death he left estate in the state of Washington consisting of real property of great value, which he specifically devised by will to the different members of his family as if the property, one tract excepted, was his separate property. The will was in form a nonintervention will, and was duly entered for probate as such. In the will he named his son John W. Guye and one Rolland H. Denny as executors. The executors named accepted the trust and proceeded with the due administration of the estate. The widow, Eliza W. P. Guye, claimed that the entire property was community property, and on her claim being disallowed by the executors, brought this action to have the status of the property determined and her rights therein adjusted.

In the final decree the trial judge found somewhat more of the property to be community property than the devisor or the executors recognized as such, but did not allow the claim of Mrs. Guye to its fullest extent. From so much of the decree as is adverse to her interests, she appeals.

Based on differences between the time and manner of its acquisition, counsel have divided the land left by the deceased into five distinct classes: First, certain tracts of land acquired by the deceased by purchase and for which deeds had passed prior to his marriage with the appellant; second, a tract of land acquired by the deceased by purchase prior to his marriage with the appellant, but for which the deed passed after such marriage; third, a tract of land acquired from the United States by the deceased after his marriage, under a coal land entry; fourth, certain tracts acquired from the United States by the deceased after his marriage, under the mining laws; and fifth, certain tracts acquired by the deceased by purchase from private holders subsequent to his marriage.

The claim that the land first described is community property is based principally upon the somewhat peculiar common property statute of 1871. Laws 1871, p. 67. By section 1 of that act, it was provided that all property owned by the husband or wife at the time of the marriage, and all the property acquired by either of them during the marriage by gift, devise, descent, bequest or inheritance, and all property purchased or acquired with the separate funds of either during marriage, and designated as separate property as per deed or inventory in accordance with the provisions of the act, should be the separate property of the spouse acquiring it, the same as though no marriage existed. Section 2, provided that all property acquired during the marriage by the joint labors of the husband and wife, or by their individual labors, together with all "rents, profits, interest or proceeds of the separate property of both accruing during the marriage," should be common property.

Sections 8, 9, 10 and 11, defined the class of debts for which the common and separate property might be sold. Section 14 provided that the husband should have the sole control and management of his own separate property, and need not be joined by the wife in any sale, transfer or encumbrance thereof. Section 15 provided that the wife should have the sole control and management of her own separate property, and need not be joined by the husband in any sale, transfer or encumbrance thereof, unless the property be that acquired by gift from the husband. Section 22 provided that the "common property being partnership property" the wife's share should be one-half thereof and should be hers and her heirs forever. Section 23 provided that neither dower nor curtesy should thereafter accrue. Section 26 provided that the husband should not by will deprive the widow of any rights under the act.

This statute remained upon the statute books but two years. At the next session of the legislative assembly it was repealed and a new law enacted. It is not necessary to point out all the differences between the new law and the one cited, but the radical changes were that the new law failed to provide that the rents, profits, issue or proceeds of the separate property of the spouses should be common property, and it eliminated section 22, which declared the common property to be partnership property. This act remained in force until 1879, when the present community property law was enacted. By the terms of the latter act, the rents, issues, and profits of separate property are expressly declared to be separate property. By the latter act also, the name "common property" was changed to "community property," and it was expressly provided that the property rights of the spouses were thereafter to be governed by the act, in the absence of a marriage settlement or post-nuptual agreement, "any act to the contrary notwithstanding."

By reference to the dates above given, it will be observed that Francis M. Guye and the appellant intermarried while

the act of 1871 was in force. Based on this fact, the appellant argues that the act of 1871 fixed the rights of property between the appellant and her husband, "and that any subsequent law could in no way alter or change it;" and "that inasmuch as section 2 of that act provides that all property acquired during marriage by the joint labors of the husband and wife, or by their individual labors, together with all rents, profits, interest or proceeds of the separate property of both accruing during marriage, shall be common property, it means nothing else than that real property of the husband and wife, when taken in consideration of section 22, becomes partnership assets and the husband and wife each become partners, and the capitalization is what each person puts into the property, and any increase or unearned increment becomes partnership or common property." In other words, it is contended that a marriage during the existence of the act of 1871 impressed the separate property with which each of the contracting parties were then seized with a trust to pay the income thereof to the common use of both spouses during the continuance of the marital relation, or until such time as they could mutually agree on some other disposition of it.

We are not able to agree with this contention. That such was not the intent of the statute is plain from the very statute itself. The statute does not, in express words, devote the income of the separate property of each of the spouses to the common use of both, nor does it in express words charge such separate property with a trust to that effect. In so far as the intent is expressed, it does nothing more than provide that the income of separate property, when it comes into existence, shall be common property. And that no such intention is implied is clear from the fact that such a construction is inconsistent with other express provisions of the statute. It is provided, it will be observed, that the spouse owning or acquiring separate property during the marriage relation shall have the sole control and management thereof,

and need not be joined by the other spouse "in any sale, transfer, or encumbrance thereof." It is provided also in the act that the separate property of a spouse shall be liable for the separate debts of that spouse, whether contracted before or subsequent to the marriage. These provisions are wholly inconsistent with the idea that the separate property of one spouse is, in virtue of the marital relation, impressed with a charge or trust of any kind in favor of the other or in favor of the common use of both, and to our minds conclusively determines the contrary. There can be no trust in property for the common benefit of two persons where one of them has power at any time to destroy the trust by disposing of the property, or by putting it to another use. In so far as the rents, profits, interest or proceeds of the separate property of either came into being during the existence of this statute, we have no doubt that they belonged to the husband and wife in common, and that it was not competent for the legislature, by subsequent enactment, to declare such property to be the property of the one or the other; but as to rents, issues, and profits of such property accruing subsequently to the passage of the act, we have no doubt that the power existed.

Counsel, however, call attention to the word "interest" in the phrase "rents, profits, interest and proceeds," and argue therefrom that something more than the mere income from the real property was meant thereby. But it must be remembered that the framers of the act used the phrase with reference to personal property as well as real property, and could possibly have had reference to a very common source of income from that character of personal property known as money. Be this as it may, however, even a casual perusal of the act will show that its framers had no very accurate conception of the meaning of words or very great skill in their use; at least, there is nothing in the wording of the act elsewhere that would imply that they had any such nicety in their use as this construction would imply. We rather

think, from the context, that this phrase was the somewhat labored effort of the draughtsman of the law to convey the idea that the entire income of the property described should become common property.

As this act stood on the statute books but two years, and as we hold that it was within the power of the legislature to say that the future income and proceeds of the separate property of the spouses should be the property of the spouse owning the separate property, it is not necessary that we discuss the effect of section 22 of the act, which declared common property to be the partnership property of the spouses, there being no showing in the record that any of the income of the property now under discussion was put back onto the property in the way of permanent fixtures or improvements which enhanced its value. Counsel argue, however, that the natural enhancement in the value accruing while the marital relation existed should be treated as community property. They point out that the tracts adjudged to be separate property by the trial court have enhanced in value practically three hundred and fifty thousand dollars since the marriage of the appellant and Francis M. Guye, and contend that it is property acquired during marriage within the spirit and intent of the statute. But we think this contention untenable also. Since by the statute the spouse owning separate property is entitled to the rents, issues and profits thereof, so such owner must be entitled to the natural increase in value, as such increase is as much the issue of such property as would be the rents derived therefrom. So, also, under such a rule, the ownership of a specific tract might be constantly changing. As long as its value remained stationary or decreased it would be separate property. But the moment it increased in value it would become mixed property; that is, in part separate and in part community. And so, again, property that is separate property today might be mixed property tomorrow, and on the next day again be separate property, owing to its fluctuation

in value. We cannot think this the meaning of the statute. We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed.

The cases relied upon by counsel to support this contention we shall not notice specifically. They call special attention, however, to the case of *White v. White*, 5 Barb. 474, and as that case is illustrative of the others, we will point out wherein we think the question at bar differs from the question there determined. The case cited was a suit by the wife against the husband. It appears that, subsequent to the marriage between the parties, the wife inherited from her father's estate a considerable tract of land situated in the state of New York. That after she had thus acquired the title, the legislative assembly of that state passed an act, the second section of which read as follows:

"The real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted." Laws New York, 1848, p. 307.

The suit was based upon this provision of the statute. The complaint set forth that the wife took possession of the inherited land soon after it was set apart to her by the commission appointed to make partition, and that she had continued to reside thereon until the last few weeks prior to the filing of the complaint, during which time she had been prevented from occupying the premises by her husband. It was further alleged that since she had acquired the property her husband had had the management and control of the same, and had enjoyed the rents, issues, and profits thereof; that he was a man of idle habits and addicted to the use of spirituous liquors; that he had been careless and improvident

in the management and cultivation of the farm and had greatly neglected it; that after the passage of the act above named, he had avowed his determination to exercise the exclusive control of the land, and had prevented the plaintiff from exercising any control thereof, and had finally, by personal force and violence, expelled her therefrom. A demurrer was interposed to the complaint, and the court held that it did not state facts sufficient to constitute a cause of action, basing its decision on the ground that, by the common law, and the law in force in the state of New York prior to the passage of the act in question, the husband, by virtue of the marriage contract, became seized of a freehold estate in the real property of his wife, and was entitled to take the rents, issues, and profits of the land during their joint lives; and, further, since children had been born alive to them, he had a freehold estate during his natural life as tenant by curtesy in the property, which right was a vested right and could not be taken away by any subsequent enactment of the legislature. This case, it is at once apparent, has no analogy to the case at bar, unless we are to hold that the statute of 1871 gave the wife, at the time of the marriage, a vested interest of some sort in the separate property of the husband. But this, as we have said, we are unable to do. Had the husband in the case at bar attempted to claim as his separate property, by virtue of the subsequent statutes, rents, issues and profits of his separate property which had come into being during the time the act of 1871 was in force, the case cited would have bearing, but no such question, as we have said, is pointed out by the record. The case furnishes no aid by which to determine the proper construction of the statute of 1871. We conclude, therefore, that the property of the first class cited was rightly adjudged to be the separate property of the husband.

The tract of land forming the second class, as classified by counsel, was purchased from the executors of the estate of Charles C. Terry. The record shows that Charles C.

Terry died February 17, 1867; that he left a will in which he named Franklin Mathias and Erasmus Smithers as executors, with power to sell and convey the real estate of which he died seized, at such times, at such prices, and on such terms as the executors should deem wise; that pursuant to the power conferred by the will, the executors sold the lot of which the tract now in question is a part to Francis M. Guye and one Charles Burnett on March 20, 1870, some two years prior to the marriage of Francis M. Guye to the appellant; that thereafter the lot was divided between the purchasers, Francis M. Guye taking the west half; that Guye took possession of the land awarded him, erected buildings thereon and otherwise improved the same; that he subsequently rented the same to tenants and collected rents therefrom, all prior to his marriage with the appellant; that a deed to the property was made by the executors January 7, 1873, nearly one year after the marriage of Francis M. Guye and the appellant; that some two years later a return to the probate court was made by the executors of the sale, reciting that a sale of the property was had on March 29, 1870, to Guye and Burnett for $500, and asking that the sale be confirmed. The record made by the executors does not show when the purchase price of the lot was paid. Burnett, however, testified that the negotiations leading up to the purchase of the lot were transacted by Guye, and that some part of the purchase price was paid at the time of the purchase, but whether all or not he did not remember. There was no evidence of any other payment.

The appellant bases her claim of a community interest in this tract on the fact that the deed to the same passed after her marriage with Guye, and the presumption, arising from the manner in which business is ordinarily conducted, that the purchase price was paid at the time the deed was delivered. But we cannot think this a just deduction from the facts shown. Clearly, Guye had a valid subsisting interest in this property at the time of his marriage. He had

taken possession of it and improved it, and paid a part at least of the purchase price. Had it been shown that the balance of the purchase price had been paid with community funds after the marriage, it might well be that, under the doctrine of *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937, the property would have been community property "to the extent and in the proportion that the consideration is furnished by the community, the spouse supplying the separate funds having a separate interest in the property in proportion to the amount of his or her investment," but clearly, the entire property could not be community property. But there is no evidence in the record that community funds entered into the purchase price of the property. Therefore, for the want of some rule with which to measure such interest, if for no other, the court cannot hold that the community had any interest in this property.

The appellant calls attention to the fact that, during the forty years of her married life with Francis M. Guye, large sums were paid in taxes on this separate property, and she asks the court to presume that the money with which they were paid was community funds, and to charge the land with one-half thereof for her benefit. But we cannot presume that the funds used to pay the taxes were community funds. What would have been the rule had it been shown that the husband had no separate income with which to pay these taxes, we do not need to discuss; but where, as here, it is shown that he did have such separate income, there can be no presumption that he used community funds for the purpose of paying his separate debts. The presumption is always in favor of honesty and fair dealing, rather than to the contrary. Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.

Nor do we think the fact that the spouses have joined in mortgaging property sufficient evidence on which to found a claim that the property mortgaged is community property. While the statute allows a husband or wife to sell and encumber his or her separate property, yet no prudent purchaser or mortgagee will ever take the separate deed or mortgage of a married man or married woman even when the other spouse sits by and disclaims interest. Such a deed or mortgage always requires explanation in subsequent dealings with the property whenever either of them forms a part of the chain of title, rendering the property less easy of disposition than it otherwise would be. The fact that both spouses joined in the encumbrances put on the property in this instance is, therefore, little or no evidence that the property was community rather than separate property.

The third class of lands claimed by the appellant to be community property are the lands acquired under coal land entries made by the husband during the existence of the marital relation and patented to him while the relation existed. In *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671, we held that land acquired by the husband under the homestead laws of the United States, where the entry was made, the necessary residence had, and the final proof made, during the existence of the marital relation, was community property. In subsequent cases we have applied the rule to preemption entries. On the other hand, we have held that land acquired under the stone and timber acts from the United States by the husband during the marital relation was his separate property. *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402; *James v. James*, 51 Wash. 60, 97 Pac. 1113. The decisions were based on distinctions existing between the several acts providing the manner of entry and the persons entitled to enter. Under the homestead and preemption acts, but one entry was allowed to a family, which must be made by the head of the family, and it was required that the family live on the land and make a certain

amount of improvements thereon before final proof could be made. The land was granted ostensibly for the benefit of the family, and the intent of Congress in passing the act was to induce men with families to settle upon and make their homes upon the public lands. Under the timber land acts no settlement upon or living upon the lands was required. The entryman was required to take an oath that he had made no other application under the act; that he did not apply to purchase the land for speculation, but for his own use and benefit; and that he had not made any agreement, directly or indirectly, in any way or manner with any person or persons whomsoever by which the title he should acquire would inure to the benefit of any person other than himself. Each of the spouses could make such an entry, and there was nothing in the act itself which indicated a purpose to grant the land as a place of residence of the individual making the entry. True, after title was acquired, the entryman could make such use of it as he pleased, but it was not the primary purpose of the grant, as it was under the homestead and preemption acts, to furnish a home for the entryman and his family. These differences we thought, and still think, are fundamental, and justify the distinction made with reference to the character of the property on its acquisition.

The method of acquiring land under the coal land acts is analogous to that of the timber and stone acts and not that of the homestead and preemption acts. Each of the spouses can make an entry and acquire title under it. No residence on the land is required. The entryman must take and subscribe to an oath to the effect that the entry is made for his own benefit, and not directly or indirectly for the benefit of any other person. By analogy, therefore, the property should be held to be separate property rather than community property. But the appellant argues that this court has expressed its dissatisfaction with the decisions under the timber and stone act holding property so acquired to be separate property, and has adhered to the rule on the doctrine

of *stare decisis* rather than on principle, thinking that to disturb the earlier rule would disturb property rights acquired under it; that here there is no precedent to interfere, as this is a case of first impression in this court and the court is at liberty to adopt such rule as it thinks most agreeable with the community system of property adopted in this state. But while it is true that the first decision under the timber and stone act was by a divided court, and it may be that individual members of the court have expressed doubt as to whether the correct rule was adopted in that case, the majority of the court has always felt that the case was correct in principle, and should be adhered to on that ground rather than on the ground of *stare decisis*. By analogy, therefore, we hold that the land here in question was the separate property of the husband, and not the community property of the husband and wife.

The fourth class involve the mining claims. The laws relating to the acquisition of mines containing the precious metals are similar to those relating to the acquisition of timber and coal lands. Either spouse can make entry under them, and acquire a full title from the United States without the aid or intervention of the other, and that such property is the separate property of the locator and not the community property of the husband and wife we held in *Phoenix Min. & Mill Co. v. Scott*, 20 Wash. 48, 54 Pac. 777.

The fifth class was adjudged by the trial court to be community property, and no question concerning the correctness of the decision is suggested on the appeal.

These conclusions require an affirmance of the judgment of the court below, and such affirmance will be ordered.

DUNBAR, C. J., CHADWICK, MOUNT, PARKER, CROW, MORRIS, and GOSE, JJ. concur.

[No. 9142. *En Banc.* May 16, 1911.]

BERTHA LEWINN *et al.*, *Appellants*, v. MICHAEL MURPHY, *Respondent*.[1]

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—FALL OF TIMBER—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY. In an action for the death of an employee, struck by the fall of a timber from the third floor of a building under construction, a nonsuit is properly granted where there was no evidence, directly or indirectly, as to the cause of the fall of the timber, or that it was negligently piled, and nothing to show that the place was not a reasonably safe place to work, except the accident itself.

SAME—SAFE PLACE—INCOMPLETED STRUCTURES. The doctrine of safe place does not apply to the construction of buildings, where the situation is constantly changing, with the same force that it does to completed structures and fixed places.

SAME—RES IPSA LOQUITUR. The doctrine of *res ipsa loquitur* is not applicable to an injury to an employee from the falling of a piece of loose timber in an incompleted building with practically open spaces between the different floors.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 2, 1909, upon granting a nonsuit, dismissing an action for the wrongful death of an employee engaged in the construction of a building. Affirmed.

Roche & Onstine and *B. O. Graham*, for appellants, contended that the doctrine of *res ipsa loquitur* is applicable to the facts of this case. *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; *Id.*, 51 Wash. 81, 97 Pac. 1104; *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 126 Am. St. 870, 16 L. R. A. (N. S.) 931; *Kaples v. Orth*, 61 Wis. 531, 21 N. W. 633; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 31 N. E. 870, 30 Am. St. 678; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Cleary v. General*

[1]Reported in 115 Pac. 740.

Contracting Co., 53 Wash. 254, 101 Pac. 888; 4 Thompson, Negligence, §§ 3882, 3883. The negligence of the defendant, under the evidence, was a question for the jury. *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182; *McMillan v. North Star Min. Co.*, 32 Wash. 579, 73 Pac. 685, 98 Am. St. 908; *Jancko v. West Coast Mfg. Co.*, 34 Wash. 556, 76 Pac. 78; *Cheatham v. Hogan*, 50 Wash. 465, 97 Pac. 499, 22 L. R. A. (N. S.) 451; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814; *Hart v. Cascade Timber Co.*, 39 Wash. 279, 81 Pac. 738; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Liedke v. Moran Bros. & Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058; *Hoseth v. Preston Mill Co.*, 55 Wash. 416, 104 Pac. 612; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244.

Cameron, Ferris, Swan & Lally, for respondent.

Morris, J.—Appellants, widow and child of Carl Lewinn, deceased, brought this action to recover for his alleged wrongful death through the negligence of respondent, and appeal from a judgment of dismissal granted by the court upon motion of respondent at the conclusion of appellants' case.

Respondent was the contractor engaged in the construction of a steel frame building at Spokane, and deceased was in his employ. On May 28, 1906, the building had reached a height of four stories. The framework was of steel, and iron columns on each floor connected with steel girders running east and west, and eyebeams running north and south. The girders were from fifteen to twenty feet long, the eyebeams from eighteen to nineteen feet long, and running at right angles to each other, leaving open spaces on each floor about

eighteen feet square. The girders running east and west were fifteen inches high, and the eyebeams running north and south were five inches high, and were so placed that the beams running east and west were five inches higher than the beams running north and south, resulting, as appellants claim, in making lumber and building material piled across these beams five inches higher on one end than on the other. The second and third floors were wholly open, except for a ten-foot platform on the inside of the walls used by the brick masons as a scaffold, and a runway of planks from one of these openings used as a hoisting shaft to the scaffold upon which material, after being brought up through the hoisting shaft, was taken in wheelbarrows to the scaffold. There was about a carload of lumber and building material of various sizes on the third floor, piled across the girders and eyebeams. For about a week prior to May 28, the work had been suspended on the building on account of lack of needed material. It was resumed on that day.

Deceased was a mortar mixer, working on the outside of the building; but about 1:30 p. m. he was called by respondent to assist him in hoisting window frames to the third story, by means of a rope running through a pulley on the fourth floor. In doing this hoisting, they were assisted by men on the third floor, who, standing upon a platform partially built across the opening, took the frames as they came up through one of these open spaces and carried them to the required place. Respondent and the deceased had been engaged at the work about twenty minutes when a stick of timber, 4x4 and about six feet long, fell from the third floor, striking a girder on the second floor, from which it bounded, and falling again, struck deceased on the head, inflicting fatal injuries. The negligence alleged was in not furnishing a safe place in which to work, and negligent manner of construction. In addition to the above facts, there was testimony to the effect that using the hoist as they were using it, and the walking of the men upon the plank runway, in carry-

ing the frames from the hoisting shaft to the walls, would cause some vibration in the girders and some springing in the planks. Respondent also answered an interrogatory propounded by appellants, saying he did not know what caused the timber to fall, but that it was not knocked loose by an employee. There are no other facts, as we view them, material to the issue submitted here, which is the error of the court in granting respondent's motion for judgment.

There was no evidence as to the place from whence the timber that struck deceased came, except that it fell from the third floor. No witness testifies, either directly or by venturing an opinion, as to what caused it to fall. There is no suggestion of human or other intervening agency in its fall. There is no evidence that the timber and material piled on the third floor were piled in a careless or negligent manner, or in a manner different from that used by prudent contractors in the same character of construction. There was no evidence that it was so piled as to be jarred loose by the vibration, caused by hoisting material or carrying it across the planks, or that it was so jarred loose. The cause of the fall was, therefore, a conjecture and speculation. No jury could have determined it except as "it might have been." The law will not permit verdicts to rest upon such conjecture and speculation, and the court was right in its ruling. *Weckter v. Great Northern R. Co.*, 54 Wash. 203, 102 Pac. 1053, and other cases from this court there cited. It is not a case for the application of the rule of a reasonably safe place. There was nothing to show the place was not reasonably safe, except the accident itself. There was no suggestion as to what could have been done to make it safer, or to prevent accidents of like character. The doctrine of reasonably safe place does not apply to the construction of buildings or other situations where the character of the place is constantly changing, with the same force as it does to a completed structure or other permanent and fixed place. All that is required is that the place be as reasonably safe as the

circumstances will permit, and that those engaged in the construction be not subject to unnecessary perils or dangers. *Fournier v. Pike*, 128 Fed. 991; *Armour v. Hahn*, 111 U. S. 313; *Finalyson v. Utica Mining & Milling Co.*, 67 Fed. 507; *Roth v. Eccles*, 28 Utah 456, 79 Pac. 918; *Kath v. Wisconsin Cent. R. Co.*, 121 Wis. 503, 99 N. W. 217; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202; *Miller v. Moran Bros.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N. S.) 283. There is no evidence before us that would bring this case within the most liberal rule announced in cases of this character.

Failing to establish any theory of negligence upon which a recovery could be predicated, appellants next invoke the doctrine of *res ipsa loquitur* upon which to base their right of recovery. With the exception of actions directed against common carriers, this rule has been applied to injuries received from falling objects more frequently than to any other class of cases. But even in these cases, there is a well defined line along which the doctrine runs. It has never been applied by the courts except where the facts and demands of justice make its application essential, depending upon the peculiar facts and circumstances in each particular case, and where the duty which the defendant owes the injured person is of such a nature that proof that the accident happened under the given conditions is of such value in law as to afford evidence of negligence in itself, and thus make out a *prima facie* case; and only then when the producing cause of the injury is under the control of the defendant, and the accident is of such a nature that it would not ordinarily occur except from the lack of due care. Thompson, Negligence, §§ 7635, 7636; *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 126 Am. St. 870, 16 L. R. A. (N. S.) 931.

"The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the

company being negligent or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, . . . a presumption of negligence on the part of the company usually arises from proof of such facts." 4 Elliott, Railroads, § 1644.

See, also, *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; *Firebaugh v. Seattle Elec. Co.*, 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990, 2 L. R. A. (N. S.) 836.

"The phrase *res ipsa loquitur*, as applied to negligence cases, is used to give expression to the idea that, when an accident is shown to be of such a character as, in the light of ordinary experience, is inexplicable except as the result of negligence, then negligence will be presumed." *De Yoe v. Seattle Elec. Co.*, 53 Wash. 588, 102 Pac. 446.

There is nothing in the case before us to justify a holding that the falling of a piece of timber in an incompleted building, with practically open spaces between the different floors, is of such an unusual and extraordinary occurrence that it would not happen except for want of due care on the part of the contractor, or that the cause of the fall was something over which the contractor had absolute and complete control; and that in the nature of things there could be no fall except in the negligent doing of some act peculiarly within the knowledge and control of the contractor. If the falling object was one that had been permanently put in place, upon whose stability, firmness and immovability the employee had a right to rely, and to assume the use of due care and caution in making it firm and stable, there might be debatable ground for the application of such a rule, but we can find none in the situation presented in this record.

There are many cases applying the doctrine where pedestrians upon the sidewalk or street below have been injured by falling signs, or boards or bricks, falling from the roof or other portions of completed buildings. Such cases readily fall within the true application of the rule in all its requirements, and we have found one case where a pedestrian was

injured by a plank falling from a building while under construction, which can be readily brought under the rule, there being in such a case no possible defense of acts of fellow servants, assumption of risk, contributory negligence, or any other that might be applied in the case of an injured employee; and it would manifestly be the duty of the contractor to so guard the erection of the building that objects used in its construction could not fall upon the sidewalk or street below and injure passers-by, wholly unconscious of any such probability and assuming no risk. We have, however, found no case where the rule has been applied to such a situation as is here disclosed. Following the liberal rule adopted by this court in personal injury cases, we did, in the case of *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; *Id.*, 51 Wash. 81, 97 Pac. 1104, apply this doctrine to the relation of master and servant, and in doing so, concededly went beyond the weight of authority; but we are not willing to be the pioneers in the announcement of the application of the doctrine to cases like the one before us. We gave as our reasoning in that case that the facts shown eliminated blame on the part of the injured servant or his fellow servants, when the injury was caused by the breaking of a cable which had been given the servant by the master for a particular use, and which at the time of the breaking was being used in the manner directed by the master; adopting the theory that "instrumentalities intended for a particular purpose, and suitable and proper for that purpose, do no break when put to the use for which they are designed, when used in a proper manner." Such reasoning is not applicable here. It cannot eliminate a number of conjectures as to what was the cause of the falling of the timber.

We have said we have found no case where, under a similar state of facts, the doctrine of *res ipsa loquitur* has been applied. We have, however, found many like cases where it has not. In *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40, plaintiff, an employee, was injured by a plank falling upon

him from an upper story of a building in the course of construction. A recovery was denied, although sought under a theory of negligence in improperly piling the plank, and by invoking the rule of *res ipsa loquitur;* the reasoning of the court being that there was no testimony showing how the accident happened, whether by reason of negligence in not properly piling the planks, or piling them in an unsafe place, or in a dangerous manner, or by reason of the negligence of fellow servants in handling the planks. The circumstances, therefore, leaving room for different presumptions, the rule called for had no application. Two cases with more in common could hardly be found. In *Nash v. Nashua Iron & Steel Co.*, 62 N. H. 406, an employee in a foundry was injured by the fall of a steel ingot from above. A recovery was denied, there being no evidence of the cause of the fall. In *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537, the injury was caused by a fall from a bucket being lowered in a shaft. The only survivor of the accident testified that something fell from above and knocked the deceased out of the bucket. After the accident, the cable supporting the bucket and dummy-yoke was found to be broken at a point above the bucket where a chain connected with the cable and the dummy-yoke, and part of the chain was found at the bottom of the shaft. There was no proof but that the apparatus used was such as was generally used in deep shafts; no evidence of defect in the plan or structure of the machinery or appliances used in lowering the bucket, or that it was not well constructed and of good material. The court said that any inference as to how or why the accident happened would be substituting conjecture for proof, and denied a recovery. In *Martin v. Cook*, 14 N. Y. Supp. 329, plaintiff was injured by the fall of a ladle from a crane above him. The sole proof of negligence relied upon was the happening of the accident; held, insufficient. In *Allen v. Banks*, 39 N. Y. Supp. 1016, a teamster loading his wagon with ice was injured by the fall of a piece of ice from above. Recovery

was sought under the rule of *res ipsa loquitur*, but denied. Other like cases might be cited, but the above are sufficient, in the absence of any contrary ruling, to show that upon authority the doctrine of *res ipsa loquitur* is not properly applicable in such a case as the one before us.

We therefore concur with the court below, and the judgment is affirmed.

Crow, Ellis, Parker, and Mount, JJ., concur.

[No. 9509. Department Two. May 25, 1911.]

J. H. Scott *et al.*, *Appellants*, v. Olympia Oyster Company, *Respondent*.[1]

Fish—Oyster Beds—Deeds—Reversion — Conveyance by State. Where, under Rem. & Bal. Code, §§ 6806, 6807, state oyster lands are deeded for the purposes of oyster culture, with reversion to the state in case the lands are not used for that purpose, the state reserving the right to re-purchase on paying for improvements, the state cannot convey the fee and reversion to a third person.

Fish—Oyster Beds—Ejectment — Title of Plaintiff — Fraud. One who fraudulently obtained the fee to state oyster lands by false representations that they were not oyster lands, knowing that a conditional fee had been granted for the purposes of oyster culture, cannot maintain ejectment against parties in possession under the oyster land deed.

Appeal from a judgment of the superior court for Mason county, Sheeks, J., entered October 7, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

J. W. Robinson and *McCafferty, Robinson & Godfrey*, for appellants.

Troy & Sturdevant, for respondent.

Crow, J.—Action by J. H. Scott and wife against Olympia Oyster Company, a corporation, to recover possession of

[1]Reported in 115 Pac. 737.

about six acres of oyster land in Mason county, to which the plaintiffs claim title. From a judgment in defendant's favor, the plaintiffs have appealed.

Appellants have excepted to findings made by the trial court, but we find no serious dispute as to any material fact. The evidence shows that one J. A. Gale, in good faith entered upon the six-acre tract as oyster land, many years prior to March 26, 1890, and continuously planted and cultivated oysters thereon until April 26, 1896, and for a long time thereafter; that he made application to the state of Washington, in due and legal form, to purchase the tract, under the provisions of chapter 25, Laws 1895, p. 39; Rem. & Bal. Code, §§ 6806-7; that, in pursuance of a contract of sale issued to him on April 22, 1896, the state afterwards, on March 28, 1899, executed and delivered to him a deed, which was recorded in Mason county on April 4, 1899, and which, in compliance with the requirements of § 2 of the act of 1895 (Id., § 6807), contained the following stipulation:

"It is expressly agreed and these presents are upon the express condition that neither said land nor any part thereof is in front of any incorporated city or town or within two miles thereof on either side, or is now used for purposes of trade or commerce, that if at any time after the execution of these presents said land or any part thereof shall cease to be used for the purpose of an artificial oyster bed it shall thereupon revert and become the property of the state of Washington, and that said land is contracted to be conveyed to the grantee only for the purpose of cultivating oysters thereon, and the state of Washington hereby reserves the right to enter upon and take possession of said tract or tracts if at any time the same is used for any other purpose than the cultivation of oysters, and the state of Washington reserves the right to enter upon and take possession of any said lands at any time when it desires, upon paying to the owner or the occupant the original purchase price of the land, together with the value of the improvements erected thereon, and the then value of the artificial oyster bed and improvements erected thereon in connection with the carrying on and propagation of oysters by artificial cultivation."

That by mesne conveyances all rights which Gale thus obtained were transferred to and acquired by the respondent, Olympia Oyster Company; that Gale and his successors in interest, including respondent, have continuously cultivated the tract as an oyster bed, have seeded the same, have cultivated oysters thereon, have taken oysters therefrom; and that no person has during any of said period, or at any time prior to the commencement of this action, been in possession, other than the respondent and its predecessors in interest, including Gale. The evidence further shows that on August 14, 1899, after the execution, delivery, and record of the deed to Gale from the state, above mentioned, one Fidelia A. Boyd applied to the state to purchase tide lands in front of, adjacent to, and abutting upon certain uplands described in her application, which included lot 4, section 22, township 19, north, range 3, west, Willamette Meridian; that in support of such application, she filed therewith an affidavit in which she deposed as follows:

"This application is made *with full knowledge of the character of the land applied for and of the title of the state thereto,* and I hereby waive and relinquish all my right to and claim upon the state for the return of the purchase price of said land in case said land or any part thereof should be found not to be tide land. In support of the above application, I do solemnly swear that I, Fidelia A. Boyd, am a citizen of the United States; that the tide land herein applied for is not situated in front of or within two miles of the corporate limits of any incorporated city or town, or in front of any lands reserved by the United States for military or lighthouse purposes; *that there are no natural or artificial oyster beds on the land herein described, nor is the same in any state oyster bed reserve; that said land is not suitable for the cultivation of oysters,* and that said tide land is located below the line of ordinary high tide and above the line of ordinary low tide;"

that Fidelia A. Boyd assigned to appellant J. H. Scott her contract to purchase tide lands in front of lot 4; that in pursuance of such assignment, a deed was thereafter executed and

delivered to him by the state; and that the tract of tide lands claimed to have been thereby conveyed, according to appellants' contention, includes within its boundaries the six-acre tract of oyster land here involved and now in respondent's possession.

Under the evidence it is impossible to conclude that Fidelia A. Boyd and J. H. Scott, her assignee, did not, at the time of the former's application to purchase the tide lands, and at the time of the deed to the latter, have actual notice and knowledge that respondent's assignors were in possession and exclusive control of the six-acre tract as oyster lands; that they had been cultivating the same continuously for many years; that by mesne conveyances respondent had obtained such title or right as had been conveyed to Gale by the state; and that the tract to which appellants now claim title as being included within the tide lands was in fact oyster land. The trial court found the title of respondent to be superior and prior to that of appellants; that respondent had a connected title in law and equity from the state; that it is entitled to complete possession to the exclusion of appellants; and that its right is in fee, save and except as it is subject to the right of reversion in and to the state.

Appellants, in substance, contend that, by reason of the act of 1895, *supra*, in pursuance of which respondent's rights were acquired, the state specifically refused to convey title to the respondent's predecessor, Gale, but withheld the same, granting only possession and use of the land for the cultivation of oysters, subject to the right of the state to claim a reversion and repossess itself; that as a matter of law the state had power to convey, and did thereafter convey, the fee simple title to appellant J. H. Scott by the tide land deed; that appellants thereupon succeeded to all of its rights and were thereby empowered to enforce the reversion, and demand and obtain possession. To this end they have tendered respondent the sum of $250 to reimburse it for

the land and any improvements that may have been made thereon by it or its predecessors.

A mere statement of the facts is sufficient to sustain the judgment of the trial court. It is evident from the act of 1895 that the state thereby reserved to itself the right to retake possession of the oyster lands conveyed to Gale, under the conditions named. But no provision appears in the act which, under the most liberal construction, would authorize the state to convey such right of reversion and repossession to a third party. If, as appellants in effect contend, the land department of the state, by conveyance of the tide lands to J. H. Scott, has transferred such rights as will authorize appellants to evict respondent, secure possession, and obtain the complete fee simple title to these oyster lands, then the state has done by indirection what it could not do directly. The conveyance to appellant Scott was made in pursuance of the contract of sale issued to Fidelia A. Boyd, which was based upon an affidavit containing the untruthful and fraudulent statements above set forth. Appellants' alleged title to these oyster lands was, therefore, fraudulently obtained, and they are in no position to oust the respondent on the theory that they have the fee simple title and that it has no title. It is manifest the state never intended to convey to Scott a fee simple title to this tract of oyster lands. Respondent is rightfully in possession as successor to Gale. Although it does not hold a fee simple title, it has obtained the exclusive right of possession and user for oyster cultivation, except as against the state. The deed to Gale, executed in strict compliance with the provisions of § 2 of the act of 1895, was not executed and delivered as an idle and frivolous ceremony, nor as a void instrument. It was intended to convey, and did convey, valuable property rights, although not a fee simple title. The interest conveyed may be regarded as somewhat similar to a base or qualified fee, although we need not hold it to be such. It would be unreasonable and an injustice to conclude that, having con-

veyed this particular oyster land to Gale, the state, without exercising or attempting to exercise its right of repossession, thereafter conveyed it in fee simple to appellants as tide lands, thereby assigning to them the power to oust respondent.

The judgment is affirmed.

MORRIS, CHADWICK, and ELLIS, JJ., concur.

[No. 9557. Department Two. May 25, 1911.]

ELSIE WARREN *et al.*, *Respondents*, v. WILLARD KEARNEY, *Appellant*.[1]

APPEAL—REVIEW—EXCLUSION OF EVIDENCE—HARMLESS ERROR. Error in the exclusion of evidence is not prejudicial where the fact was clearly proven by other evidence.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for slander in charging incest, in which the defendant pleaded in justification that the charges were true, and that was the principal issue and the fact of publication was not seriously denied, it is not prejudicial error that the court instructed the jury that they must find for the defendant if the charges were true, "otherwise for the plaintiffs," where, by other instructions, the burden of proving the complaint was placed upon the plaintiff.

SAME. Where the jury is not misled, it is not prejudicial error that the instructions were not given in the usual order and that those consistent with the plaintiff's theory were given last.

LIBEL AND SLANDER—DAMAGES—EXCESSIVE VERDICT. A verdict for $3,000 for slander in charging a woman with incest will not be set aside as excessive, where there was nothing to indicate passion or prejudice on the part of the jury.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 9, 1910, for three thousand dollars, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for slander. Affirmed.

[1]Reported in 115 Pac. 739.

John M. Wilson and *G. C. Israel*, for appellant.

Troy & Sturdevant, for respondents.

CHADWICK, J.—This is an action for civil damages, claimed to have been sustained by respondents, who are husband and wife, because of certain slanderous utterances and accusations made by appellant and directed against the good name and fame of respondent Elsie Warren, whom we shall hereafter refer to as the respondent.

The errors most relied on—five in number—go to the rejection of testimony. We have examined the whole record with care, and are convinced that, either the testimony offered and rejected was irrelevant, or the fact sought to be proven was clearly brought out in other parts of the record. Counsel sought to show the home life of respondent and her relations to her father, as well as the father's relations to the other members of his household. While barred at certain avenues, the case of appellant was conducted with such skill that every material fact relied on as a defense was open for argument to the jury. We shall not indulge in the detail of this evidence, not enough even to give permanent value to this opinion, as it would neither elucidate a principle nor illuminate the law.

The court instructed the jury as follows:

"As already stated, the defendant in this cause pleads as an affirmative defense that the plaintiff Elsie Warren, for and during a period of several years last past, has had incestuous carnal relations with Francis Kearney, mentioned in the complaint as the father of said Elsie Warren, and that these relations have existed from a period prior to her alleged marriage to said Wallace Warren down to and including the time of the answer, and that defendant alleged that the facts which the plaintiffs in their complaint charge the defendant with having stated, with reference to the relations between the plaintiff Elsie Warren and her father, Francis Kearney, are true. I instruct you, gentlemen of the jury, that, in an action such as this, truth of the statements made is a complete defense. A person charged with such a slander

may in his answer allege the truth of the matter charged as defamatory, and if he proves by a fair preponderance of the evidence the truth of such charge, to the satisfaction of the jury, such proof is a complete justification as against the action. *I instruct you that in this case the defendant has affirmatively pleaded that the charges in the complaint made against him are true,* and as stated if the truth of such statement is shown to your satisfaction, in the manner and form as you are advised under all these instructions and under all the evidence in the case, then your verdict shall be for the defendant; otherwise, for the plaintiffs."

The italicized portion of the instruction is assigned as error. It is said that, if the instruction is permitted to stand, the plaintiff might recover "without the necessity of any proof by her of the utterance of the alleged slanders, or any of them, by the defendant, notwithstanding his answer in which he denies that he made any of the statements attributed to him." As an abstract proposition this may be true, but the instruction taken as a whole, and when coupled with the justifying allegations of defendant's answer, will not be held to be prejudicial. The fact that the defendant uttered the alleged slanderous words was not seriously denied by him when called as a witness in his own behalf, and his whole case goes upon the theory that the charges made by him were true and justified. In another part of the court's charge it is said:

"The burden of proof is upon the plaintiff to prove all the essential allegations of the complaint (other than the residence of plaintiff Elsie Warren which is admitted by defendant) by a fair preponderance of the evidence."

If proof were lacking, or at all uncertain, as to the publication of the slanders, there might be some merit in appellant's contention. In the light of the whole case, we find no error in the court's instruction.

It is also contended that the instructions of the court were so arranged as to leave in the minds of the jurors an emphasis in favor of the respondent's case. It is true that the in-

structions were not given in the customary order, but there is nothing to indicate that the jury was misled in any way, or that it was influenced by the fact that the court in closing his instructions delivered those which were consistent with the theory of the plaintiff's case.

It is finally alleged that the damages are excessive. They are substantial, but we are not prepared to say that they are so excessive as to indicate passion or prejudice on the part of the jury. If there was anything in the case to indicate that the jury has accepted defendant's evidence as true in any part or particular, we would not hesitate to reduce the verdict. But it rejected it entirely, as it was bound to reject the evidence of one side or the other, for in this case there is no middle ground. Respondent was either as chaste as Diana or as foul as Phryne. Consequently respondent stands before us a woman of pure and spotless character, and as such is entitled to receive a reward in damages commensurate to the assaults upon the good character which the jury found she has hitherto enjoyed.

Judgment affirmed.

ELLIS, MORRIS, and CROW, JJ., concur.

[No. 9552. Department Two. May 29, 1911.]

O. J. C. DUTTON, *Respondent*, v. JOSEPH R. CHRISTIE *et al.*, *Appellants*.[1]

LANDLORD AND TENANT—LEASE — CONSTRUCTION—"PENALTY." A sum equal to two months' rent, paid in advance and declared by a lease to be in consideration of the execution of the lease, which provided that such payment should be credited on the last two months' rent, otherwise to belong to the lessor, is not a penalty, and cannot be offset by the lessor against rent due, upon abandonment of the premises while in arrears.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 19, 1911, upon find-

[1]Reported in 115 Pac. 856.

ings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

John T. Mulligan (*Edward Judd*, of counsel), for appellants.

Shepard & Flett, for respondent.

ELLIS, J.—The facts in this case are not in dispute. On August 1, 1909, the respondent let to the appellants certain premises in the city of Seattle for a period of five years, under a written lease by which it was provided that the rental of the premises should be $750 every month in advance. It was stated in the first paragraph of the lease that it was made "in consideration of the covenants of the second parties (the appellants) hereinafter set forth, and of the sum of one thousand five hundred dollars ($1,500) now paid to the first parties by the second parties the receipt of which is hereby acknowledged." In a subsequent paragraph it was stated that "the above payment of one thousand five hundred dollars now made shall, in the event of the full and faithful performance of this contract by the second parties, be credited in payment of rent for the last two months of said term; but otherwise said payment this day made shall belong to the first parties as a part of the consideration to them for the execution of this lease." The lease contained a further provision as follows: "The second parties will also pay the water rent, steam heat, hot water and light bills, and all running expenses upon said premises." The appellants took possession of the premises under the lease, and regularly paid their rent until the month of June, 1910. During that month they paid only $450, leaving a balance due for that month of $300. By the terms of the lease, another $750 for a month's rent became due July 1, 1910, and these amounts have never been paid. On July 11, 1910, the appellants moved out of the premises, and the respondent thereafter, to prevent injury to or destruction of the building, took possession. The ap-

pellants also failed to pay certain water rents amounting to $10.90, which the respondent was compelled to pay.

The foregoing facts appear in the findings of fact made by the trial court, and there is in the record a stipulation that, for the purposes of this appeal, the findings are true. The respondent brought this action to recover the unpaid rent and the water rate which he had paid. A judgment was rendered against the appellants for $1,060.90 and interest. The appellants claim that the judgment should have been in their favor for $439.10, being the difference between the advance payment of $1,500 and $1,060.90, the amount of the unpaid rent and water rate. The appellants earnestly insist that this $1,500, which was paid in advance, was intended as a deposit in the nature of a penalty for any failure on their part to carry out the terms of the lease; that the suit was in its essence an action for damages for breach of the contract of lease; that to allow the respondents to retain this money and at the same time have their judgment for damages would be to enforce a forfeiture or penalty; that the law abhors forfeitures and penalties; that the amount paid in advance was their money, and that the appellants therefore had the right to have it applied upon any damages recovered in the suit, and that the remainder should be returned to them. We cannot agree with this contention without in effect writing a new contract for the parties.

In the beginning of the lease the parties have declared that the lease is given in consideration of the covenants of the second parties and of the payment of $1,500. The lease was certainly a legally sufficient consideration for the payment. If there had been no further mention of this money, there could be no question of the respondent's ownership of it. Does the added stipulation that this payment shall, in the event of full performance of the contract by the second parties, "be credited in payment of the rent for the last two months of said term; but otherwise said payment this day made shall belong to the first parties as a part of the

consideration to them for the execution of this lease," change the nature of this payment from consideration to penalty? We think not. It is declared to be a part of the consideration in the beginning, and this clause reiterates the same thing. In both instances the ownership of the respondent therein is affirmed. This is not changed by his agreement to apply this sum in payment of the rent for the last two months of the term in the event of the appellants fully performing their contract. It was only by that performance that they could assert any claim upon this money. They must earn it. A penalty as defined in Bouvier's Law Dictionary, quoted by appellants, is as follows: "*Penalty.* A clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract contained in another clause of the same agreement." It is obvious that the payment here in question does not come within this definition. It is the very antithesis of a penalty so defined. The fact that the respondent was willing to forego $1,500 of the consideration of the lease in order to encourage the faithful performance of their covenants by the appellants is no good reason, either in law or in morals, for penalizing him in that amount for their failure to perform. The money was not deposited as a security. There was merely a stipulation that it should be applied in payment of rent upon a condition which has never been performed; upon a contingency which has never arisen, and now cannot arise by reason of the appellants' voluntary abandonment of the leased premises. This case is thus clearly distinguished from the New York cases mainly relied upon by the appellants. *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358, and *Caesar v. Rubinson*, 174 N. Y. 492, 67 N. E. 58. In each of those cases the tenant was required by the terms of the lease to deposit a specified sum "as security for the faithful performance" of his covenants in the lease. In the first of these cases the lease expressly specified that the deposit should be "forfeited" in case of nonperformance by the lessee. In the other

the lease provided that the deposit should be retained by the lessor as "liquidated damages" in case of a breach. There is a manifest difference between a deposit for security and a stipulation for reduction of consideration upon a contingency.

When the appellants paid this money as a consideration for the lease, the title to it passed to the respondent. Their breach of the lease cannot divest his title.

The judgment is affirmed.

PARKER, CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9360. *En Banc.* June 1, 1911.]

NORTH STAR TRADING COMPANY, *Plaintiff and Appellant*, v. ALASKA-YUKON-PACIFIC EXPOSITION, *Defendant and Appellant*[1]

APPEAL—RECORD—STATEMENT OF FACTS — EXHIBITS. Certificates, receipts, and exhibits, inserted in the statement of facts, which the trial judge refused to certify, certifying that they were no part of the evidence introduced at the trial, cannot be considered on appeal.

CORPORATIONS—ACTIONS BY—CAPACITY TO SUE—PAYMENT OF LICENSE FEE. The act prohibiting any corporation from commencing or maintaining any suit or action without alleging and proving that it had paid its annual license fee should be enforced by the courts as a license tax or revenue measure; and hence judgment for defendant on a counterclaim, in an action between two corporations, should be reversed and the action dismissed where neither corporation proved its capacity to sue, although the objection was not specially urged against the corporation in whose favor the judgment was rendered.

Cross-appeals from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered September 2, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Reversed.[2]

[1]Reported in 115 Pac. 855.

[2]Rehearing pending.

George Olson (*Edward Judd*, of counsel), for plaintiff.
Roberts, Battle, Hulbert & Tennant, for defendant.

PER CURIAM.—The plaintiff, a corporation, was a concessionaire of the defendant, Alaska-Yukon-Pacific Exposition, the corporation that conducted an exposition or fair at the city of Seattle during the summer of 1909. The plaintiff installed at the fair what was known as the Eskimo village. Prior to collecting the Eskimos and the equipment necessary to install the village, it obtained from the defendant the exclusive privilege of using for its purposes a specifically described tract of ground. On attempting to install the exhibit, it was served with notice, signed by the defendant's director of works, forbidding it to use a tract thirty feet in width across the east side of the tract described. It also learned at that time that another concessionaire of the defendant had encroached upon its ground, taking a strip some ten feet in width across another side. The effect was to reduce its concession to about two-thirds of its original size, greatly curtailing and hampering its exhibit, to its loss, as it claimed, in a large sum of money. As a part consideration for the concession granted it, the plaintiff agreed to pay the defendant a certain percentage of its gross receipts. Towards the close of the exposition it began the present action as for damages for a breach of contract, seeking to recover for the losses it claimed to have sustained because of the curtailing of the grounds originally conceded to it.

On filing its complaint, it obtained an order by way of injunctive relief, by which it was permitted to retain the percentages thereafter to become due from it to the defendant to apply on any judgment it might obtain for the damages alleged to have been suffered by it. In its complaint it alleged its corporate capacity, and that it had paid to the state of Washington its annual license fee last due, and facts tending to show a right on its part to recover from the defendant substantial damages. The defendant answered,

putting in issue the allegations of the complaint, particularly the corporate capacity of the plaintiff and the payment of the license fee, and alleged affirmatively that the plaintiff had collected and retained of the fees due it under the contract some $1,641.63, and demanded judgment against the plaintiff for that sum with interest It failed, however, to allege that it had paid its annual license fee last due. On the trial the plaintiff offered no proofs of its corporate capacity, nor did it prove that it had paid its annual license fee last due. Nor did the defendant offer on its own behalf any such proofs. The court, after hearing the evidence, found that the plaintiff had suffered damages in the sum of $750 by reason of the breach of contract. It also found that the balance due the defendant from the percentages withheld amounted to the sum alleged in the defendant's answer, and allowed the defendants judgment for the difference between that sum and the sum found due as damages to the plaintiff. Both parties appeal.

On the appeal the plaintiff inserted within the statement of facts, presented to the trial judge for settlement, certified copies from the office of the secretary of state of its articles of incorporation, and three certain receipts for licenses showing that its annual license fees had then been paid down to June 30, 1910. The receipts, however, further show that the defendant was in default as to its license fees at the time it commenced its action. The trial judge refused to certify these exhibits as part of the statement of facts, but certified, on the contrary, that they formed no part of the evidence introduced at the trial in the court below.

The defendant contends, first, that these exhibits cannot be considered as evidence in this court; and second, that the plaintiff cannot maintain its action because it did not prove that it had paid its annual license fee last due. These contentions we think are sound and must be sustained. It needs no argument, of course, to show that an appellant cannot try his case in the court of appeals on a different state of facts

from that presented to the court below, even when the trial is *de novo* in the appellate court, and this is what we would be allowing the appellant to do if we considered these exhibits as evidence.

The second objection is well taken because the statute expressly prohibits a corporation from commencing or maintaining "any suit, action, or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due." It may be that a judgment rendered in a case where no such allegation or proofs appeared would not be void, but this does not justify the court in ignoring the statute. The license tax is a revenue measure, and the prohibiting of suits or actions on the part of corporations without alleging and proving payment of the license fee is intended as a measure to enforce the collection of the tax. The courts, therefore, in the interest of good government, should not ignore the provision.

But the defendant further insists that its own part of the case should be allowed to stand and that it should have judgment against the plaintiff for the full amount of the moneys retained by it; namely, the sum of $1,631.33 with interest. But the defendant is in no better position to seek or obtain affirmative relief than is the plaintiff. It is also a corporation, and has not shown payment of its license tax last due. And were we to concede that it might retain its own cause of action after dismissing that of the plaintiff for want of capacity to sue, in a proper case, we will not do so when it appears on the face of the record that it is wanting in capacity to sue, even though the plaintiff is not specially urging the point.

The judgment entered is reversed, and the cause remanded with instructions to dismiss the action, without costs to either party. Neither party will recover costs in this court.

[No. 9366. Department One. June 1, 1911.]

T. T. WORTHINGTON, *Respondent*, v. CHARLES M. CRAPSER *et al.*, *Appellants*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY — EVIDENCE — SUFFICIENCY. Lots purchased by a husband with money received from his father, as an advance from his father's estate, are his separate property, even if he procured a loan to pay a very small portion of the purchase price, where such portion was too small to notice.

SAME—EVIDENCE—ADMISSIONS. The husband's petition for letters testamentary on the estate of his wife is not an admission that certain lots which she attempted to dispose of by her will were community property, where she had other property, and the lots in fact belonged to his separate estate.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 14, 1910, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Boyle, Warburton & Brockway, for appellants.

Burdick & McQuesten, for respondent.

PARKER, J.—This is a suit to quiet title to lots 11 and 12 of block 9, and lots 1 and 2 of block 3, in Mechanics addition to Tacoma. A trial before the court resulted in a decree in favor of the plaintiff, from which the defendants have appealed. Appellants claim an interest in the lots under the will of Phoebe Worthington, the deceased wife of the respondent, and base their claim upon the ground that the lots were the community property of respondent and Phoebe Worthington at the time of her death, thus enabling her to dispose of her interest therein by will. Respondent claims the lots as his separate property.

Respondent and Phoebe Worthington were married in 1893. At that time he had a small store and stock of notions therein

[1]Reported in 115 Pac. 849.

amounting to a few hundred dollars. She had no property at that time. During their marriage respondent's income from his store and other sources did not exceed $500 a year, which was no more than sufficient to provide a living for himself and wife. In 1897 he received about $700 from his father. At that time he purchased lot 12, and a little later he purchased lot 11. He paid for these lots $775, and we think the evidence warrants the conclusion that at least about $700 of the purchase price was paid by the money received about that time from his father. This money appears to have come to him as an advance from his father's estate, and was his separate property. There was probably a small part of the purchase price of these lots made from a loan which he then procured. This loan we think was shown to have been repaid from money which he afterwards received from his father's estate in 1898, when his father died. At that time he recived $400 or $500 from his father's estate, and he then bought two other lots for $300 with that money. These he sold in 1905 for $650, and about the same time bought lots 1 and 2 here involved, which he says he paid for with this money. There may be some room for believing that at that time he procured a loan to pay a balance on their purchase price, the amount of which balance is not shown, but which in any event must have been very small. His wife died in 1909, leaving the will under which the appellants, who are her children by a former marriage, claim an interest in these lots. The respondent is quite an old man, and his testimony, upon which we have to almost wholly depend to determine the status of this property, is not as clear and satisfactory as could be desired; but in any event it bears the stamp of truth, and we believe the foregoing is a fair summary of the facts shown thereby. We believe it fair to conclude, as was done by the learned superior court, that these lots are shown to be the product of his separate funds acquired from his father's estate. In any event, the sums which went towards

their acquisition from any other source were too small for us to notice.

The petition for letters testamentary of the deceased wife's estate filed by respondent, it is insisted, amounts to an admission that these lots were community property. The lots are not described in the petition, though even if they were, we would not be inclined to hold that that fact would estop him from now claiming that they are his separate property under the circumstances. He is by no means a man learned in the law, and from his testimony it is apparent that he had but little conception of the difference between community property and separate property when he filed that petition. The will was in his possession at the time of her death, another person was named as executor therein, and his wife appears to have had some property besides her possible community interest in these lots. Under these circumstances, he presented the will for probate and filed the usual petition therewith. We think that fact was of little or no weight under the circumstances in determining the character of this property. Under all the circumstances, we are constrained to affirm the judgment. It is so ordered.

MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9427. Department One. June 1, 1911.]

H. J. GIELENS *et al.*, *Respondents*, v. FIDELITY TRANSFER & STORAGE COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—ACTIONS—OWNERSHIP OF WAGON. In an action for injuries sustained in a collision with an express wagon, there is sufficient evidence that the wagon belonged to the defendant, where it appears that the wagon bore defendant's name, no one else operated wagons with that name, and the driver was identified as one of defendant's drivers.

SAME—NEGLIGENT DRIVING AT CROSSING. It is negligence to drive an express wagon rapidly over a slippery street with a load of gas pipes protruding from the back of the wagon, and turn so abruptly at a crossing as to cause the back part of the wagon to slide towards a pedestrian and strike her with the pipes.

SAME—CONTRIBUTORY NEGLIGENCE. It is not contributory negligence for a pedestrian to wait at a crossing for the passing of a rapidly approaching express wagon, at a place that would be out of danger if the wagon were normally loaded, without any notice or reason to anticipate danger from gas pipes protruding 8 or 10 feet from the back of the wagon.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 11, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for personal injuries sustained by a pedestrian struck by an express wagon. Affirmed.

Wesley Lloyd, for appellant.

Blackburn & Gielens, for respondents.

FULLERTON, J.—This action was brought to recover for personal injuries suffered by the respondent Alice Gielens. The record discloses that, at the time of the accident, Mrs. Gielens was crossing South Ninth street, in the city of Tacoma, at the place of its intersection with Commerce street. She was walking on the westerly side of Commerce street,

[1]Reported in 115 Pac. 850.

proceeding in a southerly direction, when she noticed a team hauling an express wagon coming from the west on Ninth street at quite a rapid gate. Ninth street at that place is quite steep, and the day was wet and the street slippery. Thinking it unsafe to attempt to cross ahead of the team, she stopped, after she had gotten part way across the street, and waited for the team to pass in front of her, keeping well out of the way of the track along which the team was approaching. The wagon was carrying a number of lengths of gas pipe or steel rods, which protruded from the back end of the wagon some 8 or 10 feet. As the team approached the respondent, it was turned sharply by the driver, and without any slacking of the speed, into Commerce street in the direction in which the respondent was going. As the wagon turned, the back of the wagon slid towards the respondent, swinging the pipes or rods against her, knocking her down and causing the injuries for which this action is prosecuted. The injured respondent testified that she was far enough away from the wagon to have escaped injury had the wagon been normally loaded, and that she did not discover the protruding rods until the wagon turned, too late to get out of the way of their swinging ends.

The case was tried by the lower court sitting without a jury. The court found that the team and wagon was the property of, and operated by, the appellant; that the driver of the wagon was guilty of negligence; that the injured respondent was free from negligence; and entered a judgment in her favor in the sum of $300.

The appellant questions the sufficiency of the evidence to justify the judgment entered. It contends, first, that there was no evidence that the team and wagon causing the injury was owned or operated by it. But we think the great preponderance of the evidence supports the finding of the court. Three witnesses testified that the wagon bore the name of the appellant, and its president testified that no wagons were operated in the city of Tacoma bearing that name other than

those belonging to the appellant. Moreover, one of the witnesses testified that he knew the driver of the wagon, and that the driver had driven wagons for the appellant for some eight months prior to the time of the injury. The testimony on the other side was of a negative nature. The appellant produced its return sheets made by the drivers on that day, which showed that none of them reported having hauled iron pipes or rods for any person on that day. But we do not think this conclusive, or that it overcomes the positive evidence to the contrary. The driver might have been careless or negligent in making his report, or he might have omitted the item purposely to avoid inquiry. On the other hand, the witnesses for the respondent were positive in their identification; in fact, one of them called up the place of business of the appellant within a short time after the accident happened and notified the president of the company of the fact.

It is next said that there was no evidence of negligence on the part of the driver. But we think to the contrary. He drove rapidly over a wet street with an unusual load, made an abrupt turn just as he passed the respondent, causing the back part of the wagon to slide towards her and the protruding irons to swing around and strike her. The negligence does not consist in making the turn. The driver had a right to do that, and pedestrians must take notice of that right and of the fact that a turn may be made. Nor does it consist in the fact alone that the load of the wagon protruded beyond the bed of the wagon. This is permissible so far as any rule of the highway is concerned. This condition only required more care in driving. But here the negligence consisted in careless driving with an abnormal load. The respondent was not bound to anticipate that the wagon was loaded in an unusual manner. She had a right to assume that if the place at which she stood while waiting for the wagon to pass was a place of danger because of some abnormal con-

dition of the load, the driver of the wagon would warn her of that fact, either by requesting her to stand further away or bringing the team to such a rate of speed that the danger would be avoided.

Nor was the respondent guilty of contributory negligence. On the contrary, her conduct was prudent throughout. Not only did she not attempt to cross in front of the team, although she seems to have had time to do so, but she stood sufficiently far to one side to avoid all possible injury had the conditions been such as they appeared to her to be. Her testimony is that as she looked at the approaching wagon she did not see the protruding irons; that it appeared to be an ordinary wagon with an ordinary load, driven perhaps with greater speed than prudence dictated, but yet not with recklessness. She stood on that side of the cross-street that would place her out of danger from a wagon normally loaded in case a turn was made either way into the cross-street. The only thing she did not anticipate was that the wagon carried irons protruding 8 or 10 feet from the back of the bed, and this we think she was not bound to do. The preponderance of the evidence, therefore, supports the finding of the trial judge.

It is not necessary to review the cases cited by the appellant. They state the law correctly as applied to the facts before them, but we do not find that any of them present a case with facts parallel to the facts in the case at bar.

The judgment is affirmed.

PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9372. Department One. June 1, 1911.]

William Rieflin, *Appellant*, v. A. E. Grafton *et al.*, *Respondents*.[1]

Mechanics' Liens—Notice of Claim—Time for Filing—"Cessation"—Replacing Defective Material. The date of "cessation of the furnishing" of material for a building, within Rem. & Bal. Code, § 1134, requiring claims to be filed within 90 days therefrom, is the date on which the materialman on demand of the owner replaced defective material rejected by the architect, where the materialman acted in good faith and not for the purpose of prolonging the time.

Same—Foreclosure — Findings — Conclusions of Law. Where the architect rejected material and the owner demanded that the materialman replace it, which was done, a finding that it was "not done in performance of the original contract," is an unwarranted conclusion of law.

Same—Duplicate Statements to Owner. Rem. & Bal. Code, § 1133, requiring a materialman to deliver to the owner a duplicate statement of the supplies delivered to any person or contractor for the construction of a building, does not apply to materials delivered to the owner.

Same—Foreclosure—Defenses—Damages. Upon the foreclosure of a materialman's lien for materials furnished to and accepted by the contractor, the owner must look to the contractor for any damage resulting from defective material put in the building.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered August 31, 1910, upon findings in favor of the defendants, dismissing an action to foreclose a materialman's lien, after a trial on the merits before the court. Reversed.

William Rieflin and *Stallcup & Keyes*, for appellant.

C. M. Riddell and *Davis & Neal*, for respondents.

Gose, J.—This is a bill in equity to foreclose a materialman's lien. There was a judgment of dismissal, from which the plaintiff has appealed.

[1]Reported in 115 Pac. 851.

The facts in brief are as follows: The respondents, the owners of certain lots situated in the city of Tacoma, entered into a contract with one Dillon, whereby the latter agreed to construct a dwelling house upon the property. The appellant furnished sash, windows, and doors to the contractor, to be used, and which were used, in the house. All the material furnished by the appellant was furnished between March 2 and June 2, 1909, except two or three panes of glass. These were furnished on the order of the respondent Grafton, on August 18, 1909, to replace defective glass theretofore furnished by the appellant. On October 14, 1909, the appellant filed a claim of lien for the material which he had furnished, and caused it to be duly recorded. The trial court denied the lien, because he was of the opinion that the lien should have been filed within ninety days from June 2, 1909, and it was not so filed. The court found that the architect in charge of the construction of the dwelling condemned and refused to accept the material furnished by the appellant, notified him thereof, and demanded that it be removed from the dwelling and that other material conforming to the specifications should be substituted. The court further found:

"(5) That on the 18th day of August, 1909, in pursuance of a request and order from said A. E. Grafton, and without any knowledge on the part of said A. L. Dillon, and not in performance of the original contract between plaintiff and Dillon, plaintiff herein sent to the said dwelling house a box containing certain lights of glass, which were delivered by the plaintiff for the purpose of replacing defective panes of glass theretofore put into said building; that two or three panes of glass so delivered on August 18th, 1909, were put into the building, being substituted for defective panes, the defects not being apparent or discovered until after all material furnished by said plaintiff had been put into the house; and the balance of the glass so delivered on August 18th, 1909, was returned to plaintiff; that at the time of such delivery on August 18th, 1909, no statement thereof, either original or duplicate, was delivered or mailed either to A. E. Grafton, Anna S. Grafton, or the Minnesota Investment Company, the owners of said property."

The statute, Rem. & Bal. Code, § 1129, provides that every person furnishing material to be used in the construction of a building has a lien upon the same for the material furnished. Section 1134, so far as pertinent to the present inquiry, provides that no lien shall exist or be enforced unless, within ninety days from the date "of the cessation" of the furnishing of the material, a claim for such lien shall be filed for record. We think the learned trial court misinterpreted the statute. The delivery of August 18 was made upon the demand of one of the owners of the property, for the purpose of correcting defects which he claimed existed. The good faith of the appellant in furnishing these items cannot be questioned. The time for filing the claim of lien had not then expired, and the material was not furnished for the purpose of prolonging the time for filing it, or for the purpose of renewing a right to a lien which had been lost by delay. As was said in *Conlee v. Clark*, 14 Ind. App. 205, 42 N. E. 762, 56 Am. St. 298:

"Moreover if the time for filing the lien was extended by the last labor done, this was performed at his [the owner's] special instance and request, and he must be deemed chargeable with the knowledge of the legal consequences of his own act."

The same rule is concretely stated in *McIntyre v. Trautner*, 63 Cal. 429, as follows:

"Defendant cannot be heard to say that the additional work, done at his request to complete the contract, was not a continuation of the previous work, and done under the same contract."

The following authorities announce the same view: 27 Cyc. 147, 148; *Gordon Hardware Co. v. San Francisco & S. R. R. Co.*, 86 Cal. 620, 25 Pac. 125; *Minneapolis Trust Co. v. Great Northern R. Co.*, 74 Minn. 30, 76 N. W. 953; *Id.*, 81 Minn. 28, 83 N. W. 463; *Shaw v. Fjellman*, 72 Minn. 465, 75 N. W. 705; *Stidger v. McPhee*, 15 Colo. App. 252, 62 Pac. 332; *General Fire Extinguisher Co. v. Schwartz*

Bros. Com. Co., 165 Mo. 171, 65 S. W. 318; *Farnham v. Richardson*, 91 Me. 559, 40 Atl. 553; *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1, 25 N. E. 1060; *New England Engineering Co. v. Oakwood St. R. Co.*, 75 Fed. 162; *McLean v. Wiley*, 176 Mass. 233, 57 N. E. 347; *Miller v. Wilkinson*, 167 Mass. 136, 44 N. E. 1083; *Fitzgerald v. Walsh*, 107 Wis. 92, 82 N. W. 717, 81 Am. St. 824.

We think the facts found bring the case squarely within the statute. The language of finding 5, that the delivery of August 18 was "not in performance of the original contract," is a conclusion of law which does not flow from the facts stated.

The respondents rely upon the case of *Ellsworth v. Layton*, 37 Wash. 340, 79 Pac. 947. In that case the work was completed and accepted during the first days of October. On January 6, upon the demand of the owner, the contractor put metallic flashings over six windows that had been inadvertently omitted, and on February 13 certain drain tile was relaid. The claim of lien was filed on April 3. It was held that the time for filing the lien commenced to run upon the completion and acceptance of the building. As we have seen, the court found in the case at bar that the material furnished by the appellant and put into the building by the contractor was not accepted. The *Ellsworth* case is therefore distinguishable.

Nor does the fact that the appellant failed to furnish the owner a duplicate statement of the items furnished on August 18 defeat the lien. The statute, Rem. & Bal. Code, § 1133, provides that every person furnishing material to be used in the construction of a building "shall, at the time such material or supplies are delivered to any person or contractor," deliver or mail to the owner of the property upon which the material is to be used, a duplicate statement of all such materials "delivered to any contractor or person." In this case the material was delivered to the owner upon his demand. The words "person or contractor" have no reference to a delivery

to the owner. If the legislature had intended to provide for cases where the delivery was to the owner, it would have done so in clear language, and would not have left it to the courts to extend the statute to such cases by construction. In *Finlay v. Tagholm*, 60 Wash. 539, 111 Pac. 782, and *Id.*, 62 Wash. 341, 113 Pac. 1083, the material was furnished to the contractor and not to the owner.

The material, aside from that furnished on August 18, was furnished to the contractor and accepted by him. The respondents must, therefore, look to the contractor for any damages resulting from material put into the building which does not conform to the contract.

The judgment is reversed, with directions to enter a decree establishing the respondents' lien for the items set forth in finding 4, with legal interest, together with a reasonable attorney's fee and costs, and to decree a foreclosure of the lien.

FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9396. Department One. June 1, 1911.]

FRANK NALEWAJA, *Respondent*, v. NORTHWESTERN IMPROVEMENT COMPANY *et al.*, *Appellants*.[1]

MASTER AND SERVANT—COAL MINES—SAFE PLACE—VENTILATION—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that the owner of a mine failed to perform the imperative and continuing duty to cause air to circulate in the working places in a coal mine, imposed by Rem. & Bal. Code, § 7381, where there was black damp in plaintiff's working place, the foreman instructed him to continue working there and said the falling of the rock would bring ventilation, and the plaintiff testified he would have broken through the wall to good air in about an hour and a half.

SAME—INJURY FROM FALLING ROCK—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. There was sufficient evidence that the presence of black damp in a coal mine was the proximate cause of an injury from falling rock, where the plaintiff's lights were put out by the black damp and he was struck by a rock falling from the face of

[1]Reported in 115 Pac. 847.

coal, two to eight feet distant from the place where plaintiff was timbering, and he might have seen the rock and avoided the injury if he had had a light.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a coal miner was guilty of contributory negligence in timbering or failing to timber his working place is for the jury, where it appears that he was timbering when his lights went out and he was struck by a rock falling from the side, he would have finished the timbering within thirty minutes if he had not been injured, and according to one witness the timbering was two or four or six feet from the face of the coal, defendant's witness claiming it should be kept within two and one-half or three feet.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 12, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a coal miner through the fall of rock. Affirmed.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte*, for appellants.

Gordon, Easterday & Askren and *R. L. Sherrill*, for respondent.

GOSE, J.—The respondent, plaintiff below, was injured by the falling of a rock while working for the appellant corporation in a coal mine as an underground miner. The appellant McDowell was the superintendent of the appellant corporation at the time the accident happened. There was a verdict and judgment for the respondent. This appeal followed.

The respondent was forty years of age and had had eighteen years' experience as a coal miner when he received the injury complained of. The interior of the mine where the coal was being mined consisted of gangways, counters, chutes, air courses, and fans. The negligence charged is, that the appellants failed to provide a good and sufficient amount of ventilation for the persons employed in the mine; that air was not made to circulate through the place where

the respondent was working; that black damp accumulated at such place; that the respondent complained of the presence of that element to the appellant McDowell; that the latter informed him that it would disappear as soon as he began working; that respondent resumed labor at his working place; that his light was extinguished in consequence of the black damp; and that he was struck and injured by the falling of a large rock which he could not guard against in the darkness. The answer denied that there was black damp where the respondent was working; denied that the air was not circulating; and alleged affirmatively, (1) that the respondent assumed the risk of the falling of the rock; (2) that the injury resulted from the negligence of respondent in failing to properly timber the places where he was working. The affirmative matter was put in issue by the reply.

The appellants make three principal contentions: (1) That an abundance of air was supplied, and if there was black damp, it was due to respondent's negligence in failing to set brattices to divert it from the gangways and counters into his working place; (2) that there is no causal connection between the black damp and the falling of the rock; and (3) that the rock fell in consequence of the respondent's failure to properly timber his working place.

In respect to the first contention, it may be said that there is abundant evidence that there was black damp where the respondent was working. He testified that the appellant McDowell directed him to continue working, and that the latter said to him that the falling of the rock would bring ventilation. He stated also that he would have broken through the wall to good air, where his partner was working, in about an hour or hour and a half. The statute, Rem. & Bal. Code, § 7381, requires the owner, agent or operator of every coal mine to provide in the mine "a good and sufficient amount of ventilation for such persons and animals as may be employed therein," and that the "air must be made to circulate through the shafts, levels, stables and working places of each mine."

In speaking of the duty of the mine owner under this statute, in *Delaski v. Northwestern Imp. Co.*, 61 Wash. 255, 112 Pac. 341, we said:

"The provisions of the statute measure the respondent's duty. The legislature, in recognition of the hazards of working in coal mines, has made careful provisions for their inspection, and imposed imperative duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence *per se*."

The duty to cause the air to circulate in the working places was a continuing and imperative one upon the appellants, under the statute.

As to the second contention, we think the jury was warranted in concluding that the presence of the black damp was the proximate cause of the injury. It is true, as the appellants urge, that the black damp did not cause the rock to fall. The method followed in coal mining is to leave stumps, or coal in blocks, to support the gangways and cross-cuts. For a week prior to the injury the respondent was engaged in taking down the stumps and timbering as he proceeded with the work. He was injured about ten o'clock on Monday morning. He commenced work about seven o'clock, and had been timbering from that time until the accident happened. He testified that, during that time, his light was extinguished three times by the black damp, and that he went to other workmen and renewed his light. The light went out the last time about simultaneously with the falling of the rock. The appellants' witnesses testified that the rock fell from the face of the coal, which was from two to eight feet distant from the place where the respondent was timbering. We think the jury was warranted in concluding that, if the respondent had had a light, he might have seen the rock fall, stepped aside, and avoided the injury.

It is earnestly insisted that the failure of the respondent to properly timber his working place caused the rock to fall,

and precludes a recovery. The appellant McDowell testified that the timber should be kept within two and a half or three feet of the face of the coal. Matt Jackson, a witness for the appellants, testified that the timber was some "two or four or six feet" from the coal. The respondent testified that he had not worked on Sunday, and that on Sunday the rock had kept dropping so as to make enough space for him to timber. The appellant McDowell further testified that, owing to the condition of the floor, the respondent should have placed sills under the upright pieces. The appellants' rules, however, contain no such requirement. Rule 8 provides that it is the duty of the miner to properly support the roof of his working place by timbers or props, and that "cap pieces must be placed above each timber or prop." The respondent testified that he would have finished timbering in thirty minutes, had he not been injured. Whether the respondent was guilty of negligence in timbering or in failing to timber, which contributed to his injury and barred a recovery, was a question of fact for the jury. *Kreymborg v. Thurston*, *ante* p. 219, 115 Pac. 77. It is said, however, on the part of the appellants, that the case in this respect is controlled by *Smith v. Hecla Mining Co.*, 38 Wash. 454, 80 Pac. 779. That case was reversed by this court for the giving of an improper instruction. The substance of the instruction was to the effect that the law does not, under any circumstances, exact from the servant the use of diligence in ascertaining the dangers which surround him.

The judgment is affirmed.

Fullerton, Parker, and Mount, JJ., concur.

[No. 9403. Department One. June 1, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. D. D. BRACHE, *Appellant*.[1]

ROBBERY—EVIDENCE — SUFFICIENCY. A conviction of robbery is sustained by the evidence of the victim that the defendants seized and carried him along the sidewalk, abstracted silver from his trouser's pocket, and threw him down on the walk, and that, when he got up, his pocket book and gold pieces which he was carrying in his inside coat pocket were gone.

ROBBERY—ISSUES AND PROOF—VARIANCE. Upon an information, charging robbery of "lawful money of the United States," it is not a fatal variance to prove the taking of $1.75 in silver and a twenty and a five-dollar gold piece, the *prima facie* presumption being that the witness was speaking of current coins of the country, especially where no objection thereto was made below.

CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR. On a trial for robbery, error in excluding the accused's explanation of what he did between the time of the transaction and his arrest is not prejudicial, where there was no evidence of flight.

TRIAL—INSTRUCTIONS — TIME FOR REQUEST — DISCRETION. Under Rem & Bal. Code, § 339, providing that the court shall instruct the jury at the conclusion of the evidence, and thereafter counsel may address the jury, it is discretionary for the court to refuse to give a further instruction after argument of the counsel.

ROBBERY—TRIAL—INSTRUCTIONS. In a trial for robbery, where defendants severed, an instruction that the accused could not be found guilty unless the jury found that he took the money from the prosecuting witness, is more favorable to accused than his requested instructions that he could not be found guilty unless he assisted in taking it or the taking was within the common purpose of the defendants.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 10, 1910, upon a trial and conviction of the crime of robbery. Affirmed.

Myron C. Cramer, for appellant.

J. L. McMurray, *A. O. Burmeister*, and *F. G. Remann*, for respondent.

[1]Reported in 115 Pac. 853.

Gose, J.—The appellant was tried, convicted, and sentenced upon an information charging him with the commission of the crime of robbery, and has appealed. The charging part of the information is as follows:

"That the said Theodore N. Rush and D. D. Brache in the county of Pierce, in the state of Washington, on or about the 6th day of September, nineteen hundred and ten, then and there being, unlawfully and feloniously did then and there take from the person of Charles Willard, by means of force and violence and fear of injury and against the will of the said Charles Willard, $25 lawful money of the United States, the personal money and property of the said Charles Willard."

Appellant and his codefendant demanded and received separate trials.

The appellant first contends that the evidence is insufficient to support the verdict. The evidence of the complaining witness is to the effect that, on the date alleged in the information, he met the appellant and his codefendant in the town of Buckley; that they seized and carried him for some distance along the sidewalk; that the appellant abstracted from his trousers pocket all of his silver, amounting to about $1.75; that they then threw him onto the sidewalk, face downward, and that, when he got onto his feet, his pocket book, containing "a twenty dollar gold piece and one five," which he was carrying in his inside coat pocket, was gone. There is some corroboration of this testimony. Our statute, Rem. & Bal. Code, § 2418, defines robbery as the "unlawful taking of personal property from the person of another . . . against his will, by means of force or violence or fear of injury, immediate or future, to his person or property," etc. The evidence of the taking of the money is ample to support the verdict. True, the appellant denied laying his hands upon the complaining witness except to assist him to arise after he had fallen from drunkenness, and denied the taking of the money. But the truth of the testimony was for the jury.

The next point urged is, that the information charges the taking of "lawful money of the United States;" that there is no evidence that it was such, and that the variance is fatal. Matter descriptive of the subject of the crime, subject to exceptions not involved here, must be proved as laid in the information. 1 Bishop, New. Crim. Proc., § 488. We think, however, that, when the state offered evidence tending to show that the appellant forcibly took $1.75 in silver and a twenty and a five-dollar gold piece from the person of the complaining witness, it made a *prima facie* case. True, the witness did not expressly state that it was lawful money of the United States, but we think that the jury had a right to presume, in the absence of countervailing evidence, that he was speaking of the current coins of the country where the crime was committed and where the case was tried. When we hear a person speak of a silver or gold coin without any qualifying words, we understand him to mean the silver and gold coins of our own country. It is a well-settled rule of evidence that any inference which may be reasonably drawn from a fact testified to by a witness is as legitimate evidence as the fact itself. We are aware that this view is not in harmony with the rule announced in *State v. Phillips*, 27 Wash. 364, 67 Pac. 608, and some cases in other jurisdictions. The modern trend of judicial thought, however, is toward a more liberal interpretation and application of the law in both civil and criminal cases, to the end that substance and not form shall control. *State v. Brown*, 62 Wash. 293, 113 Pac. 782; *State v. Jones*, 53 Wash. 142, 101 Pac. 708.

At the close of the state's case, the appellant did not challenge the sufficiency of the evidence, but proceeded to present evidence to offset the case made by the state. Had he then challenged its sufficiency on the ground now urged, the state could have reopened the case and offered the evidence which it had inadvertently omitted. So far as the record discloses, the precise question was not called to the attention of the court below. Indeed, we have before us the certificate of

the trial judge stating that this question was neither raised during the trial of the case nor in the motion for a new trial. This, we think, offers an additional reason for holding the evidence to be sufficient.

It is next urged that the state introduced evidence tending to prove the flight of the appellant after the commission of the crime, and that he was denied the right to explain what he did between the time of the commission of the crime and his arrest. The evidence which appellant sought to explain was the statement of one of the state's witnesses, to the effect that she told the appellant and his codefendant to let the complaining witness up or that she would call the police, and that, as she walked away toward her house, they were going straight from her house, "not on a run, but just near on a run. They were going without running," down the railroad, in an opposite direction from Buckley. This was not evidence of flight, but was a part of the *res gestae*. The only evidence as to the time of the commission of the alleged robbery is that of the complaining witness and the appellant, both of whom testified that it occurred about three o'clock in the afternoon. The appellant was arrested on Main street in the town of Buckley, according to his testimony, about three-thirty o'clock of the same day, and according to the testimony of the town marshal who arrested him, between four and five o'clock. The appellant also testified that he went down the railroad, but made no statement as to whether he ran or walked. He was then asked: "What did you do then?" An objection was sustained to this question, and this is the error now suggested. The trial court should have permitted him to answer the question, but we do not think, in view of the facts stated, that any prejudice resulted.

After the appellant's counsel had addressed the jury and after the jury had been instructed, the appellant requested the court to give the following instruction:

"If you find that a robbery was committed, and if you further find that the actual taking of the money was done

by the man Rush, and that the defendant Brache was present at the time of the taking, you cannot find the defendant Brache guilty unless you find either that Brache assisted in the taking of the money, or, if you find that he did not assist in the taking but was present, you must further find, before you can find him guilty, that the taking was within their common purpose. That is, if you find that Brache was present but took no part in the robbery, in order to find him guilty you must find that there was a common purpose between Rush and Brache to commit the robbery and that Brache was present in the course of carrying out that common purpose."

The court refused the instruction, on the ground that it came too late. This is assigned as error. The code, Rem. & Bal. Code, § 339, subd. 4, provides that the court shall instruct the jury at the conclusion of the evidence, and that thereafter counsel may address the jury. Assuming that the statute is directory, it clothes the court with a discretion which was not abused. *Manhattan Life Ins. Co. v. Francisco*, 17 Wall. 672. Moreover, the court had already instructed the jury that:

"The question, therefore, for you to determine is, whether or not the defendant did on or about the 6th day of September, 1910, take from the person of Charles Willard by means of force or violence or fear of injury, and against the will of the said Charles Willard twenty-five dollars, or other sum, lawful money of the United States, or thing of value, the personal money and property of the said Charles Willard. If you find that the defendant D. D. Brache did so do, then you should find him guilty of the crime of robbery as charged in the information in this case; if upon consideration of the testimony you find that the defendant D. D. Brache did not so do, then you should find him not guilty."

Preceding the giving of this instruction, the court had instructed that the defendants had severed, and that they were to consider only the case of the appellant and determine his guilt or innocence "under the charge against him." These instructions were more favorable to the appellant than the

one requested. The requested instruction would have been in direct conflict with them.

The judgment is affirmed.

FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9540. Department One. June 1, 1911.]

NICK GLUCINA, *by his Guardian, Mike Glucina, Respondent*, v. GOSS BRICK COMPANY, *Appellant*.[1]

MASTER AND SERVANT—EMPLOYMENT OF CHILD UNDER AGE LIMIT—VIOLATION OF STATUTE—LIABILITY — DEFENSE. One who unlawfully employs a child under the age of fourteen years, prohibited by Rem. & Bal. Code, § 2447, assumes all the risk of personal injuries while he is engaged in the performance of the prohibited duties, regardless of contributory negligence; and in an action by the child, it is no defense that the father of the child misrepresented his age, or that the employer did not "knowingly" violate the statute, and exercised due care to ascertain the age of the child.

DAMAGES—EXCESSIVE VERDICT — LOSS OF HAND. A verdict for $8,500 for the loss of a right hand by a boy under fourteen years of age will not be set aside as excessive, where the trial court refused to interfere.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 14, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a youthful employee in a brick factory. Affirmed.

F. S. Blattner, Fogg & Fogg, and *Hudson, Holt & Harmon*, for appellant, contended, among other things, that the child labor statute is not violated unless the defendant knew, or in the exercise of reasonable care ought to have known, that the boy was under fourteen. *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869; *Koester v. Rochester Candy Works*, 194 N. Y. 92, 87 N. E. 77, 19 L. R. A. (N. S.) 783; *Marino v. Lehamaier*, 173 N. Y. 530, 66 N. E.

[1]Reported in 115 Pac. 843.

572, 61 L. R. A. 811. A breach of the child labor law does not preclude the defense of contributory negligence. 26 Cyc. 109; 20 Am. & Eng. Ency. Law (2d ed.), p. 151; *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460, 49 Am. St. 935, 30 L. R. A. 82; *Lee v. Sterling Silk Mfg. Co.*, 101 N. Y. Supp. 78; *Schmidt v. Printing Business of Bruen*, 56 Misc. Rep. 130, 106 N. Y. Supp. 443; *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755; *Darsam v. Kohlmann*, 123 La. 164, 48 South. 781, 20 L. R. A. (N. S.) 881; *Evans v. American Iron & Tube Co.*, 42 Fed. 519; *Jacobson v. Merrill & Ring Mill Co.*, 107 Minn. 74, 119 N. W. 510, 22 L. R. A. (N. S.) 309; *Barclay v. Puget Sound Lumber Co.*, 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140; *Olsen v. Tacoma Smelting Co.*, 50 Wash. 128, 96 Pac. 1036; *Ball v. Peterman Mfg. Co.*, 47 Wash. 653, 92 Pac. 425; *Kirby v. Wheeler Osgood Co.*, 42 Wash. 610, 85 Pac. 62; *Campbell v. Wheelihan-Weidauer Co.*, 45 Wash. 675, 89 Pac. 161.

Govnor Teats, Hugo Metzler, Leo Teats, Ralph Teats, and *Peter David*, for respondent.

MOUNT, J.—Action for personal injuries. The respondnet, Nick Glucina, who was under the age of fourteen years, was employed by the appellant in a brick factory. He was employed to operate a hoisting machine. This machine consisted of a large wheel, called a bull wheel, to the axle of which a drum was attached. A cable was wound upon the drum and was used in drawing cars filled with clay from a pit, along an inclined track, to about the point of the hoist. The bull wheel was operated by means of a friction pulley, which revolved upon the outer rim of the wheel. This friction pulley was located on the right-hand side of the bull wheel, about level with the axle thereof. On the opposite side of the bull wheel was a brake. This brake and friction pulley were so connected together that, by the use of a lever with its fulcrum near the friction pulley, the pulley would be drawn

against the bull wheel, while the brake on the opposite side would be released, and *vice versa*. When the lever was raised to a vertical position, the friction wheel was released from the bull wheel and the brake was applied. When the lever was placed in a horizontal position, the friction wheel was applied and the brake was released. The friction wheel was in constant motion. The boy was employed to operate this lever. While in this employment, he caught his right hand either in the friction pulley or between the brake and the bull wheel. The result was the mangling of his hand so that it is of little use. This action was brought by his father, as guardian *ad litem*, to recover damages.

Two complaints were filed in the action. In the first complaint, it was alleged that the injury occurred by the hand being caught in the friction pulley while the car was being drawn up the incline. In the next complaint, it was alleged that the injury occurred by the hand being caught between the brake and the bull wheel while the car was going down the incline. At the trial the boy testified, through an interpreter, that the injury occurred in the last named way. No one except the boy saw the accident. The complaint, in addition to the fact that the boy was under fourteen years of age, alleged that the defendant neglected to warn the boy of the dangerous condition of the place, or to caution him as to such dangers and hazards, and also that the defendant had neglected to guard the dangerous places upon the machine. The defendant for answer denied the allegations of the complaint, and pleaded that the boy assumed the risk and was guilty of contributory negligence. The defendant also pleaded, that the boy was employed at the urgent request of his father, who represented to the defendant that the boy was over the age of sixteen years and competent and able to do the work; that the defendant relied upon the representations made by the father and believed that the boy was, as he appeared to be, over the age of sixteen years; that the boy was employed solely by reason of the representations made and

the appearance of the boy, and not otherwise. The trial court sustained a demurrer to the last named affirmative defense.

During the trial of the case, the defendant offered to show that it had used care to ascertain the age of the boy, and had exercised good faith in giving the boy employment; and requested the court to instruct the jury to the effect that, if the defendant used care in order to determine the age of the boy, and had been informed by the boy's father that the boy was over fourteen years of age, and that, if the age and appearance of the boy were such as to lead the defendant to believe, and that if from these considerations the defendant did actually believe, that the boy was over the age of fourteen years at the time of the employment, then the defendant would not be guilty of a violation of the statute in employing the boy. The trial court denied this request and instructed the jury, in substance, that, if they found that the boy was under the age of fourteen years at the time of his employment or injury, and that he was employed to work in this mill or factory and was injured therein, the employment was unlawful; that the defendant assumed all the risk; that the defense of contributory negligence of the plaintiff was not available to the defendant; and that the representations made by the father as to the age of the boy were no defense to the action. The jury returned a verdict in favor of the plaintiff for $8,500. This appeal is prosecuted from the judgment entered upon the verdict.

The appellant argues that the court erred in sustaining the demurrer to the defense of good faith, and in instructing the jury to the effect that the good faith of the defendant in employing the boy was immaterial in the case. The statute makes it unlawful for any person to employ a male child under fourteen years of age in any factory, without the written permission thereto of a judge of the superior court of the county wherein such child may live. Laws 1909, p. 948, § 195 (Rem. & Bal. Code, § 2447. The same statute also

makes it unlawful for any person having the care, custody, or control of such child to permit such employment. It is obvious that the legislature, under its police power, sought to protect the lives and limbs of children in shops and factories by prohibiting such employment. In *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869, we said:

"The manifest purpose of the act is to prohibt the employment of children in certain places, and the prohibition extends to all parties connected with the employment. The employment as well as the hiring out, is forbidden. An employer who knowingly employs or keeps in his employ a minor within the prohibited age, is guilty of a violation of the statute, and the employment itself is illegal. In the case at bar the minor was employed without the intervention of either parent or guardian, and if we adopt the views of counsel the act punishes only the child himself, the very person whom it sought to protect."

In that case at that time we used the word "knowingly," and counsel now argues that, without such knowledge, there is no guilt. But we are of the opinion that the employer must know at his peril that the person employed is over the prohibited age. In that same case we held that it was no defense that the child represented himself as being over fourteen years of age. And in *State v. Constatine*, 43 Wash. 102, 86 Pac. 384, 117 Am. St. 1043, which was a criminal prosecution for selling liquor to a minor, where the statute used the word "knowingly," we held that, if the bartender knew that the child was a minor, or had such information from his appearance or otherwise which would lead a prudent man to believe he was a minor, and if followed by inquiry must bring knowledge of that fact home to him, then the sale was made knowingly. See, also, *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037.

In the statute now under consideration the word "knowingly" does not appear. It was used in *Kirkham v. Wheeler-Osgood Co.*, *supra*, upon the assumption that knowledge followed from the fact that the child was actually under that

age. We have no doubt that, if the father were suing for loss of services of the child, his representation that the child was sixteen years of age would estop him from saying otherwise at this time. But the fact that the father misled the appellant is no defense as against the child. Even if the appearance of the child indicated that he was over the age of fourteen years, that fact would not relieve the defendant, because the statute makes no such exception. It recites:

"Every person who shall employ any male child under the age of fourteen years at any labor whatever, in or in connection with, any store, shop, factory, . . . shall be guilty of a misdemeanor."

In the case of *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766, which was a case similar to this, the supreme court of Illinois said:

"These instructions were refused, and it is argued that the appellant was not liable unless it appeared that it had knowingly violated this statute. The Dram-shop act forbids the sale of intoxicating liquors to minors. This court has held, under that statute, that it is immaterial whether the dram-shop keeper knew the purchaser to be a minor, and that it is no answer to say that the seller may be imposed upon and made to suffer the penalties of the law when he had no intention to violate its provisions. *McCutcheon v. People*, 69 Ill. 601. The reasoning which led to that conclusion obtains here. Appellant was, by the statute, permitted to employ in its shops only persons above the age of 14 years. It must ascertain, at its peril, that the persons it employs are members of the class of persons it may lawfully employ."

To the same effect also is the case of *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229. In *Lenahan v. Pittston Coal Min. Co.*, 218 Pa. 311, 67 Atl. 642, 120 Am. St. 885, 12 L. R. A. (N. S.) 461, the supreme court of Pennsylvania said:

"After full consideration we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and when the age limit was so fixed, an employer who violates the act by

engaging a boy under the statutory age does so at his own risk, and if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principle that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child so employed, did not have the mature judgment, experience, and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation."

See, also, *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915.

We are satisfied, therefore, that the court did not err in sustaining the plaintiff's demurrer to the affirmative answer, or in giving the instructions which were given, or refusing the instructions mentioned above which were requested by the appellant.

Appellant also argues that the judgment is excessive. The injury was a severe one. The boy has substantially lost his right hand. What there is left of it appears to be almost useless, if it is not an actual detriment to him. We are not convinced, therefore, that the judgment is so excessive that we should make a reduction, in the face of the verdict and the refusal of the trial judge to interfere.

The judgment is therefore affirmed.

PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9516. Department Two. June 1, 1911.]

THE STATE OF WASHINGTON, *on the Relation of C. Hofstetter, Plaintiff*, v. BEN SHEEKS, *Judge, etc., Respondent.*[1]

APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATE—MANDAMUS TO COMPEL CERTIFICATION. Where the return of the trial judge shows that a proposed statement of facts in narrative form is untrue, an unqualified mandate to compel him to certify to the same will not issue, but he will be directed to specify his objections and give appellant opportunity to comply with his demands.

APPEAL—RECORD—STATEMENT OF FACTS — PREPARATION. The appellant has a right to file a statement of facts in narrative form, but the burden is upon him to furnish a sufficient statement to show the facts upon which error is predicated.

SAME—AMENDMENTS—SUFFICIENCY. Proposed amendments to a statement of facts in narrative form cannot require the substitution of the stenographer's minutes, and are insufficient if they do not point out wherein the statement is erroneous.

Application filed in the supreme court April 15, 1911, for a writ of mandamus to compel the superior court for King county, Sheeks, J., to certify a proposed statement of facts. Granted.

L. H. Wheeler, for relator.

Roberts, Battle, Hulbert & Tennant and *Geo. R. Biddle*, for respondent.

CHADWICK, J.—The relator has applied for a writ of mandamus, directed to the superior court of King county, to compel the certification of a statement of facts. The record shows that, on February 25, 1911, relator prepared and filed a statement of facts on appeal, in a case wherein he was plaintiff and the Sound Trustee Company and others were defendants. The statement was partly in the narrative form, and was in part made up of the stenographer's notes. On March 9, 1911, counsel for the defendants filed and served a

[1]Reported in 115 Pac. 859.

document which they called proposed amendments to the statement of facts, but it goes no further than to move the striking of what they called the "proposed statement" adopted by the relator, and the substitution therefor of the notes of the reporter. No amendments were proposed or errors pointed out in the statement filed, although an affidavit has been filed in this court in which it is asserted that the proposed statement, in so far as it is in the narrative form, is garbled and inaccurate and contradictory of the testimony as actually given by the witnesses. The trial judge has made return to our order to show cause, saying, among other things, that:

"As the case was being reported at the trial I had taken no notes of any consequence. So at the time, more than two months after the trial, I did not think I could point out all the amendments and corrections necessary to make a substantially complete or correct statement of all the material facts, especially without the presence and assistance of the attorney who had tried the cause for defendants. . . . Insisting as I then understood him, that as no amendments had been proposed by the adverse party, he was entitled to have the statement certified as he had presented it. Upon inquiry I found that a transcript of the evidence which relator had undertaken to reproduce in narrative form and wherein the defects were found could be had upon payment of the customary price. I then suggested to the attorney for relator that he and the attorney on the other side get together and see if they could not agree upon a statement, or that he procure a transcript of the evidence, or that at least it be taken up again when the attorney who had tried the cause for defendant could be present. At first he objected and insisted on his right to have it signed on the ground above stated. But after explaining to him that I though I ought not certify that as being true which I believed untrue, I understood him to acquiesce in the suggestion."

The court has then said that the statement as prepared is untrue and does not recite all of the material facts occurring at the trial. Because of this return, an unqualified writ will not issue, for, if in the judgment of the trial judge the state-

ment does not fully meet the requirements of the statute, in that the statement should show all the material facts, matters, and proceedings occurring in the cause (Rem. & Bal. Code, § 1729), he is not bound to do so. Neither can the court compel the production of the extended notes of the stenographer; for as we said in *State ex rel. Roberts v. Clifford*, 55 Wash. 440, 104 Pac. 631, that would be substituting the stenographer's judgment for his own.

"He should require the party proposing a statement of facts to embody therein all the material facts, whether such a requirement means less or more than may be shown by the stenographer's transcript; and in so requiring, the court must itself, from its memory or other aids which it may properly employ for such a purpose, determine when the proposed statement is sufficient."

The practice of bringing a narrative statement of the testimony to this court is to be encouraged. The statement in the affidavit filed on behalf of the respondent, that more than one hundred pages of the record have been reduced to four pages, does not to our minds indicate that it does not contain all the material facts testified to by the witness. On the contrary, it might still be subject to a motion to strike for redundancy, for our experience has taught us that the usual and ofttimes necessary repetitions and reiterations of the trial are not always essential to give this court a proper understanding of the facts. But it does not follow that this privilege can be abused. In whatever form proposed, the burden is on the appellant to furnish a statement of the testimony sufficient to show this court the facts upon which the assignments of error are predicated and to give this court a full understanding of the case. The burden cannot be shifted to the respondent by filing an incomplete narrative. *State ex rel. Fowler v. Steiner*, 51 Wash. 239, 98 Pac. 609. The so-called amendments proposed by the parties defendant in the principal case were insufficient, in that they did not point out wherein the proposed statement was erroneous, and should not be considered by the court; but the trial judge

having certified to this court that the proposed statement is in some respects untrue, the writ will issue, with directions to the lower court to specify his objections so that the relator may have formal opportunity to comply with his demands.

"The court should, if in its judgment the statement omitted certain material evidence or proceedings, order the insertion thereof in the record, and continue so to order until it could properly make its certificate in the language of the statute." *State ex rel. Roberts v. Clifford, supra.*

MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9404. Department Two. June 2, 1911.]

CHARLES VIETZEN *et al.*, *Respondents*, v. J. T. OTIS *et al.*, *Appellants.*[1]

TAXATION — PAYMENT — EQUITABLE LIEN FOR PAYMENT. Where taxes are compromised by one claiming ownership of the land of another, his equitable lien therefor is limited to the sum actually paid, and cannot be extended to cover the original tax or services in making the payment.

TAXATION—RECOVERY OF TAXES PAID—INTEREST. Rem. & Bal. Code, § 9233, providing that the occupant or tenant or any other person paying taxes on real estate which ought to have been paid by the owner, lessor or party in interest, may recover the same, with interest at ten per cent, has no application to payments by parties claiming to own the land and making payment for themselves; since the statute was intended to protect parties who pay taxes for the use of other persons, and the rule of *ejusdem generis* applies in the construction of the words "any other person."

Appeal from a judgment of the superior court for Thurston county, Sheeks, J., entered August 15, 1910, in favor of the plaintiffs, for the amount of a lien for taxes paid, and interest, in an action to quiet title. Affirmed.

Troy & Sturdevant, for appellants.

McCafferty, Robinson & Godfrey, for respondents.

[1]Reported in 115 Pac. 858.

Morris, J.—This appeal is the aftermath of *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264, to which case reference may be had for a full statement of the facts. The judgment in the first case quieted the title in respondents, subject to a lien in favor of appellants for all taxes paid, with legal interest, and remanded the case to the lower court to ascertain the amount of such taxes and the extent of the lien. In doing so, it appears that the total amount of taxes against the property amounted to $2,084.09, which appellants compromised with the county by the payment of $1,000. They sought, however, to sustain their lien in the sum of $2,084.09, upon the theory that they were the assignees of the county and as such were entitled, as against respondents, to the amount first claimed by the county, irrespective of the amount paid in settlement of such claim.

We cannot so hold. Under repeated announcements of this court, appellants were entitled to an equitable lien upon the property for taxes paid by them in good faith under a claim of ownership; but such lien could not extend beyond the amount paid by them in protecting what they conceived to be their title to the property, and was intended to reimburse them for the payment of charges which inured to the benefit of the property. Although defeated in their claim of title, having preserved the property for the true owner, they were in equity entitled to the money necessarily expended in removing any claim the county might have asserted for its unpaid taxes. This amount was the sum of $1,000. Irrespective of what was due, the county accepted such sum in full payment. Equity would not recognize a claim greater than the cost to appellants, since it is only by giving effect to such equitable rule that there could be any recovery. For the same reasons the lower court was justified in refusing to compensate appellants for what they conceived to be the value of their services in bringing about this compromise.

The judgment directed the amount paid as taxes should bear interest at the legal rate. Rem. & Bal. Code, § 9233, reads:

"When any tax on real estate is paid by or collected of any occupant or tenant, or any other person, which, by agreement or otherwise, ought to have been paid by the owner, lessor or other party in interest, such occupant, tenant or other person may recover by action the amount which such owner, lessor or party in interest ought to have paid, with interest thereon at the rate of ten per cent per annum."

Appellants claim they come within this section and should recover ten per cent interest, while the court only awarded them interest at six per cent. This section covers payment of taxes by occupants or tenants, or other persons not claiming ownership in real property, but seeking to protect their possession or leasehold interest, in paying taxes that should have been paid by the owner, but because of whose failure to pay, the property becomes subject to a sale for unpaid taxes, under which the rights of the occupant or tenant might be terminated or interfered with, to prevent which the statutory lien is given. Appellants are not such as are here described. They paid these taxes as owners, claiming ownership and title, and assuming primary liability for such payment. They did not pay another person's taxes to protect any interest they had by way of lease or occupancy, intending to assert a lien against the owner. They paid what they assumed to be the taxes on their own land, for their own benefit, and with no thought of seeking a repayment from others. Such being the evident purpose of the statute, and the intention of appellants in making the payment, the rule of *ejusdem generis* applies; appellants being neither occupants nor tenants, nor included in the statutory meaning "any other person," such designation referring to those and those only whose relation to the property is of the same nature as "occupant or tenant," or one whose relation to the property grows out of or is subject to superior title in

the owner. That the court at the time of rendering its former judgment had this construction in mind, is evident from the language then used in awarding the lien, not as a statutory or legal right, but one resting alone in equity because paid in good faith under an invalid claim of ownership.

We hold with the lower court in its entry of judgment, and the same is affirmed.

DUNBAR, C. J., CHADWICK, ELLIS, and CROW, JJ., concur.

[No. 9544. Department Two. June 2, 1911.]

MATILDA C. CHILBERG *et al.*, *Respondents*, v. STANDARD FURNITURE COMPANY, *Appellant*.[1]

NEGLIGENCE—DANGEROUS PREMISES—DEGREE OF CARE—CUSTOMARY METHODS. It is not negligence for a dealer in carpets to display the same in a well-lighted room upon a smooth hard wood floor, or to leave a small carpet upon the floor for a time after it had fulfilled its use in the display, where that was the usual custom of ordinarily prudent carpet dealers; and accordingly it is not liable for injuries sustained by a customer in slipping and falling on the floor or the small carpet, no negligence being shown.

Appeal from a judgment of the superior court for King county, Main, J., entered October 21, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a customer in a store falling upon the floor. Reversed.

Farrell, Kane & Stratton and *Richard Saxe Jones*, for appellant.

Roberts, Battle, Hulbert & Tennant, for respondents.

MORRIS, J.—Appellant is the owner of a large furniture and carpet store at Seattle. On April 28, 1909, Mrs. Chilberg visited the store for the purpose of purchasing some carpet. She was conducted to the carpet department, and

[1]Reported in 115 Pac. 837.

there various carpets were exhibited to her. The carpet department is in a large, well-lighted room, having a maple floor which is smooth and hard. The method of showing goods to an intending purchaser is to display them upon this hard floor, seeking to produce as near as possible the appearance of the carpet when laid. In exhibiting the carpets to Mrs. Chilberg, the clerk, after rolling out two lengths from a large roll, and placing them side by side upon the floor, picked up a third and smaller piece, called a drummer's sample, twenty-seven inches wide and from three to six feet long, as described by different witnesses, and placed it alongside of the other carpet on the floor, to show how it matched. Mrs. Chilberg made her selection, and then asked to be shown some stair carpet, and was directed by the clerk to follow him to another section. She proceeded to do so, and had gone about ten feet when she slipped and fell, sustaining the injuries complained of. She says she slipped on this small piece of carpet because, after falling, she saw it at her feet, although she cannot say how it was removed from the floor where she last saw it. She thinks the clerk must have picked it up and dropped it there, although she did not see him do so. The clerk says he left it on the floor alongside of the other carpet, and at no time removed it from where he had first exhibited it. However this may be, we do not regard it as having any controlling effect upon the question submitted upon defendant's appeal from an adverse judgment.

The first question to be determined, giving full effect to Mrs. Chilberg's testimony as to the manner of the accident, is, does it establish negligence? Negligence is a breach of duty which one person owes to another by reason of the relation existing between them, and the duty in each particular instance is to be tested by what the ordinarily prudent person would do in a like situation. It is shown to be customary for carpet dealers to exhibit their stock upon a hard wood floor, which by reason of the constant slipping of carpets over and upon it, is always smooth. It

is also the custom to permit the carpets, after being shown, to remain upon the floor a reasonable length of time until removed by a porter. This being the usual custom followed by ordinarily prudent merchants in the same line of trade, appellant was not guilty of negligence in adopting it, as its only duty to its customers was to maintain its display room in such a condition as a reasonably careful and prudent merchant would deem sufficient to protect customers from danger, while exercising ordinary care for their own safety. *Stone v. Smith-Premier Typewriter Co.*, 48 Wash. 204, 93 Pac. 209.

This rule must be applied with reference to the situation disclosed by the evidence, and appellant's apparent arrangement for the display of its goods to the best advantage both to itself and to its customers. With this in mind as the law, we cannot find that it unreasonably or unnecessarily exposed its customers to dangers. It was not required to so exhibit its goods or maintain its store as to warrant the safety of its customers from all injury or risk of danger. When it used such diligence as ordinarily prudent and good business men employed in like situations, it performed its whole duty. It was not negligence to display its carpets upon the floor, nor was it negligence to use a hard maple floor for that purpose, or to leave the small carpet upon the floor after it had fulfilled its use in the display. Mrs. Chilberg was accustomed to polished hard wood floors. She had them in her own home and knew rugs and small pieces of carpet upon such floors will sometimes slip when stepped upon. Such fact is within the knowledge of all men who enter the modern home with its rugs and hard wood floors. We cannot say that it was negligence for the appellant to maintain the same floor condition in its store that Mrs. Chilberg maintained in her own home; or that in inviting her to inspect its carpets upon such a floor, it heedlessly and unnecessarily exposed her to an unknown danger. The case does not fall within the principle announced in holding mer-

chants guilty of negligence when maintaining open and unguarded stairways, basement entries, and places of like character, or in permitting obstructions to remain upon its stairways or in its aisles, upon which the unwary are liable to step and fall.

Appellant having shown it followed the usual custom in the place and manner of its display of its merchandise, using the same method employed by ordinarily prudent men engaged in the same line of business, there being no evidence to the contrary, and the accident itself being no proof of negligence, there was no proof of negligence to submit to the jury, and the motion to dismiss should have been sustained.

Judgment reversed, and cause remanded with instructions to dismiss.

MOUNT, CHADWICK, CROW, and ELLIS, JJ., concur.

[No. 9259. Department Two. June 2, 1911.]

H. G. BRACE, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

RAILROADS—AGENTS—SCOPE OF AUTHORITY. The superintendent of the dining car department of a transcontinental railroad has *prima facie* authority to contract for menu card folders for use in the company's dining cars.

WITNESSES—CROSS-EXAMINATION—DEVELOPMENT OF DEFENSE. In an action on contract by a railroad company, signed by an authorized agent, it is not proper cross-examination, after the agent has merely identified his signature, for the defendant to develop its defense that the order had been materially altered after it was signed.

TRIAL—QUESTION FOR JURY—CREDIBILITY OF WITNESS. Upon an issue as to whether a contract had been altered after it was signed by defendant's agent, the credibility of the evidence of the agent is for the jury.

[1]Reported in 115 Pac. 841.

Appeal from an order of the superior court for King county, Gay, J., entered July 18, 1910, granting a new trial, after granting a nonsuit, in an action on contract. Affirmed.

C. H. Winders, for appellant.

H. A. P. Myers, for respondent.

Crow, J.—This action was commenced by H. G. Brace, doing business as H. G. Brace & Company, against Northern Pacific Railway Company, a corporation, to recover profits plaintiff would have realized in fulfilling an order for menu card folders. A nonsuit was granted, but later an order was entered sustaining plaintiff's motion for a new trial, from which the defendant has appealed.

The written order, taken for respondent by one W. S. Smith, his agent, was signed by H. J. Titus, conceded to be the superintendent of the appellant's dining car department, with offices in St. Paul, Minnesota, and Seattle, Washington. The alleged order provided that 25,000 bas-relief special menus were to be shipped to the Northern Pacific Railway commissary department at St. Paul, were to portray illustrated subjects, and were to be submitted to appellant for inspection. Respondent introduced evidence to show that he proceeded with the fulfillment of the order, that he at all times tendered full performance, but that he was prevented from completing the work by appellant's failure to act upon or approve certain preliminary sketches submitted for inspection. The controlling issue of fact was whether H. J. Titus, alleged to have executed the written order, had authority to thereby bind appellant.

Appellant contends, (1) that respondent failed to show such authority; and (2) that the order was altered in a material respect after its alleged execution. When the order was delivered to respondent, the business card of Titus was attached thereto, upon which appeared the appellant's trademark, and the words: "Hazen J. Titus, St. Paul, Minn.,

Superintendent Dining Car Dep't. Northern Pacific Railway." Although it is conceded that Titus held the position mentioned, appellant contends no evidence was introduced showing the full scope of his authority; that the burden was imposed upon respondent to establish by competent evidence the fact that Titus, as superintendent of appellant's dining car department, was authorized to contract for and order the cards; and that proof of his official position was not of itself sufficient.

It is elementary that a principal is only responsible for acts of his agent performed within the scope of his authority, and that to hold the principal to such responsibility, a third party in dealing with the agent must ascertain his authority, and know that he is acting within its apparent scope. Ordinarily it would not be difficult for persons dealing with one assuming to act as agent of a private individual, to ascertain the nature and extent of his authority; but in dealing with an agent who, as manager or superintendent, controls or is in charge of a department of a great corporation such as appellant, a different condition would be presented. Corporations necessarily act through authorized agents. The more extensive their business, the greater the number of their agents. Departments are created, in charge of superintendents, with many subordinates through whom the corporation conducts its business and deals with the public. If each and every individual having business with such a corporation must at his peril ascertain and determine the exact scope and limitation of the agent's authority, it is manifest that he could not safely deal with the acknowledged agent, and that the business of the corporation itself would be materially impaired. The public is compelled to rely upon the apparent authority of the conceded agents of such corporations, especially when, as managers or superintendents, they are placed in control of departmental affairs. The average individual would be justified in believing the superintendent of the dining car department of a railway corporation was

authorized to contract for menu cards for exclusive use in its dining cars, the superintendent himself assuming to purchase them. The superintendent should know the limitations placed upon his authority, and it is to be presumed he will not exceed them. But a private individual not connected with the corporation could not be aware of such limitations. He would readily sell supplies to such an agent for use in his particular department. If for its own purposes a corporation is compelled to employ an agent with such apparent authority as may mislead the public, it should be required to secure one who will not act in excess of his actual authority, and thereby deceive others. Respondent has an order, signed by H. J. Titus, conceded to be superintendent of appellant's dining car department. The cards could only be used in dining cars, and were to be shipped to appellant's commissary department. Respondent was justified in assuming that Titus, the superintendent, had authority to purchase the cards for dining car use. Titus, by giving the order, asserted and exercised such authority. Respondent in good faith proceeded to fill the order upon his part, and incurred expense in so doing. He repeatedly wrote Titus relative to subjects submitted for inspection, receiving but one answer. Although much time elapsed, the respondent was not advised by Titus, by appellant, or by any of its agents, that Titus had exceeded his authority, until respondent commenced this action, when appellant answered by denials only. It now urges the defense that Titus acted in excess of, or without, authority.

Respondent conceded it might be possible for appellant to adduce proof sufficient to nullify his *prima facie* case; and that if no further evidence as to the authority or apparent authority of Titus was thereafter produced, respondent might possibly fail before the jury. But he contends that, in any event, the question of authority, under the evidence, was for the jury. In *Moses Land Scrip & Realty Co. v.*

Stack-Gibbs Lumber Co., 56 Wash. 529, 106 Pac. 207, we said:

"Corporations necessarily act through officers and agents, and in these busy times, when the great bulk of the transactions of the commercial world is carried on by them, parties with whom they deal do not always find it convenient, practicable, or possible to ascertain from the corporation records what the exact authority of such agents may be, in advance of each and every business negotiation. The public, therefore, deals with those individuals who, in apparent authority, conduct and have charge of the offices and other places of business maintained by such corporations, and who are thus held out as their authorized agents."

In *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125, we said:

"In this day and age when so large a part of the business of the commercial world is transacted through the agency of corporations, those dealing with them cannot be expected to prove the authority of corporate agents by producing a power of attorney under the corporate seal. They have a right to rely upon the apparent authority of those with whom they deal, and for acts done within the scope of that authority the corporation is bound."

In *Parrot v. Mexican Central R. Co.* (Mass.), 93 N. E. 590, in speaking of the authority of a general passenger agent and a passenger traffic manager to bind a railway company to contract for a publication known as a guide book, the supreme judicial court of Massachusetts said:

"Apparently, they were the general and highest representatives of the corporation that had any direct dealings with the public in reference to the business of the passenger department. They seem to have had all the authority that anybody dealing with the public had to bind the corporation by contracts for the expenditure of money in their department. The business which they had in charge called for the expenditure of money. A secret instruction to them, as general agents in charge of such business, that they should obtain permission from an executive officer before expending

any money, was not binding upon persons dealing with them in good faith, in reliance upon their ostensible authority."

On the record before us, we hold sufficient evidence was produced for submission to the jury, upon the issue of the authority of Titus.

Appellant further contends the undisputed evidence shows that the written order upon which this action is predicated was altered in a material respect after it had been signed by Titus. The respondent called Titus as a witness, and directing his attention to the order, had him identify his signature, asking no further question. On cross-examination appellant, over respondent's objection, was permitted to show that a change, contended to be material, had been made in the wording of the order. Respondent insists this cross-examination was improper; that its admission was erroneous, and constituted error sufficient in itself to sustain the order granting a new trial. The evidence thus elicited by appellant from its superintendent was an attempt to establish its defense through the medium of respondent's witnesses, and over respondent's objection. We do not think it was proper cross-examination. But, conceding it to have been proper, the testimony of Titus thus elicited upon his cross-examination was not conclusive upon respondent. He was an interested and unfriendly witness. By voluntary statements, not responsive to questions propounded, he attempted to inject statements into the record for the purpose of showing the alteration appellant now urges. His credibility was for the jury, and it was for them to determine whether the alleged alteration had in fact been made. The case was one for the jury.

The judgment is affirmed.

Chadwick and Morris, JJ., concur.

[No. 9237. Department Two. June 2, 1911.]

JOHN LYNCH, *Appellant*, v. NINEMIRE PACKING COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—RES IPSA LOQUITUR. The doctrine of *res ipsa loquitur* does not apply where a vat for rendering tallow exploded and injured an employee after it had been successfully and continuously used for two and a half years, where the injured servant had complete charge and control of all the appliances and the cause of the explosion could not be ascertained; since the circumstances do not raise a presumption of negligence against the master where he is not in control.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 28, 1910, granting a nonsuit in an action for personal injuries sustained by an employee in a packing house through the explosion of a vat. Affirmed.

E. J. Adams, *Dan Pearsall*, and *A. Emerson Cross*, for appellant.

Bridges & Bruener and *Morgan & Brewer*, for respondent.

CROW, J.—Action by John Lynch against Ninemire Packing Company, a corporation, to recover damages for personal injuries. From a nonsuit and order of dismissal, the plaintiff has appealed.

Appellant contends the trial judge erred in sustaining respondent's motion for a nonsuit. The evidence shows the following facts: Respondent was operating a wholesale meat and packing establishment in Aberdeen, and had installed in its plant a large vat for rendering tallow. In the vat were two openings, one above for receiving the materials, and one below for discharging the same after rendering. The lower opening could be closed by adjusting a swinging trapdoor, around the edge of which burlap was inserted to pre-

[1]Reported in 115 Pac. 838.

vent leaking. The door when closed was held by a clamp hooked over a rim on the vat, and securely fastened with an eye bolt passing through the clamp and door. The tallow was rendered by means of steam conducted into the closed vat from an engine and boiler which generated about eighty pounds pressure. The pressure in the vat was reduced and controlled at about forty to forty-five pounds by a suitable gauge provided for that purpose. The appellant was in exclusive charge of the vat, engine, boiler, and equipment. He had been thus employed for about eighteen months, but insists he was not an experienced or expert engineer.

On the evening of March 1, 1909, appellant adjusted, closed, and fastened the trapdoor over the lower opening. On the next morning he filled the vat from above with proper materials for rendering, closed the upper opening, turned on the steam, examined the gauge, noticed the pressure in the vat did not exceed forty to forty-five pounds, went into the engine room to look after the steam and boiler, returned to the vat, noticed that it was leaking, and to stop the leaking, tightened the clamp by turning the eye bolt. Shortly thereafter, while he was performing other necessary work near the vat, it suddenly exploded and caused him to be burned by hot tallow which escaped about him. The vat was thrown some two hundred feet, and after the accident it was discovered the clamp had been broken at the point where the eye bolt had passed through. No evidence was introduced sufficient to show whether the breaking of the clamp caused the explosion or the explosion caused its breaking. These various appliances had been successfully and continuously used for about two and a half years, no complaint being made of their fitness, suitability, or condition of repair.

Appellant's controlling contention is that the respondent, his master, did not provide him with a reasonably safe place in which to work, nor with reasonably safe appliances; and that the doctrine of *res ipsa loquitur* should be applied to this case, as one in which the accident itself suggests negligence

on the part of the master. In support of these contentions he cites, *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 92 Am. St. 892, 61 L. R. A. 583; *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. 936; *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; *Id.*, 51 Wash. 81, 97 Pac. 1104; *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888, and *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162. He contends that, when it had been made to appear from the evidence that he was properly using an instrumentality furnished by his master, which failed to perform its functions and exploded without fault on his part, he had made a *prima facie* case of negligence on the part of the master, under the doctrine of *res ipsa loquitur;* and that it then devolved upon the respondent to show by competent evidence that it was without fault, or that the accident occurred without negligence on is part.

It is true that, in the cases cited, this court applied the doctrine of *res ipsa loquitur* to the facts shown, and that in some of them the relation of master and servant existed. But in none of them did the servant have complete charge of the alleged defective appliances, in the sense that at the time he was exclusively using and controlling them. Appellant, as the respondent's servant, had exclusive control and supervision of all the appliances at the time of the explosion, and for a considerable period immediately prior thereto. The maxim of *res ipsa loquitur* is applied in negligence cases on the theory that the accident, in the light of surrounding circumstances, is of such a character as to raise a presumption of negligence from the occurrence itself; and on the further theory, that the injured party is not in a position to explain its cause; while the party charged, having more favorable opportunities, is in a position to thus explain and show himself free from negligence, if such be the case. If the circumstances do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged,

or if the plaintiff himself has equal or superior means of information, the doctrine will not apply.

In *Beall v. Seattle*, a pedestrian on a city sidewalk was injured by the explosion of a boiler wrongfully installed and maintained beneath the sidewalk, of which boiler he could not and did not have any knowledge. In *Klepsch v. Donald*, the plaintiff was injured by a stone thrown some distance from a blast with which he had no connection. In *LaBee v. Sultan Logging Co.*, the plaintiff was injured by the breaking of a cable which had not been placed, inspected, or in any manner regulated by him. He was not using the cable at the time of the accident. It was broken by a strain imposed under the direction of a vice principal of the master, who was then upon the ground. In *Cleary v. General Contracting Co.*, the plaintiff used a scaffold prepared for him by the defendant. He had nothing to do with its adjustment or construction. In *Riggs v. Northern Pac. R. Co.*, a brakeman in the course of his employment seized a defective handhold, which he had not theretofore inspected or used. In the *LaBee* case, in 51 Wash. 82, 97 Pac. 1104, we said:

"Where the facts of the case are such as to eliminate blame on the part of the servant, or his fellow servants, but show *prima facie* neglect on the part of some one, we think the master should be put to his proofs to show that the blame is not his, just the same as he would be were the injury to a stranger. *Such a rule casts the burden upon the person who is in a position to know the facts, and who can make the proofs by direct and positive evidence*, while the rule contended for by the appellant compels the resort to indirect and circumstantial evidence."

This doctrine should not be applied to the facts before us. Appellant necessarily possessed superior knowledge as to the instrumentalities he was adjusting, operating, and using. Under such conditions, if a servant happens to be injured by the failure of an instrumentality to perform its ordinary functions, it is but just that some affirmative negligence be fixed upon the master to hold him liable, his knowledge of

the true cause of such failure being inferior to, or at least not superior to, that of the servant. Appellant testified he had done nothing out of the ordinary, thereby seeking to eliminate negligence on his part. If, however, the doctrine for which he contends is to be applied to such a case as this, the master would be at the mercy of a servant, who might do many things in the course of his employment, unknown to the master, which would contribute to or cause the accident.

In *Losie v. Delaware & H. Co.*, 126 N. Y. Supp. 871, the court said:

"The doctrine of *res ipsa loquitur* was not intended to exempt the plaintiff from the burden of proving affirmatively negligence, or circumstances making negligence a legitimate, if not an irresistible, inference. In the language of Judge Cullen in *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, its 'application presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence.' It is not the accident, but the manner and circumstances of the accident, that justifies the application of the maxim. The fact of the casualty and the attending circumstances may themselves furnish all the proof of negligence that it is necessary to offer; but when, as in this case, they do not, a plaintiff must prove facts and circumstances from which the jury may fairly infer negligence as the cause of the accident. 'In no instance can the bare fact that an injury has happened, of itself and divorced from all surrounding circumstances, justify the inference that the injury was caused by negligence.' *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; *Griffen v. Manice, supra.*"

In the *LaBee* and other cases cited by appellant, we held that, under proper conditions and circumstances, we would not deny an application of the doctrine of *res ipsa loquitur* to negligence cases arising between master and servant. But when machinery, instrumentalities, or appliances are prepared for use and operated by the injured servant himself, without the direction, intervention, or supervision of the

master, and the servant, being in exclusive charge, controls and directs them, it would then appear that the circumstances were not such as to necessarily raise a presumption of negligence on the part of the master and subject him to the application of the maxim. The master, not being in control, would be at a much greater disadvantage in attempting to account for the accident and explain its true cause than would the servant. *In Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. 630, 52 L. R. A. 922, the court, in discussing one theory upon which the maxim is based, said:

"The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present."

Here the management and control were not exclusively vested in the respondent. In an action of this character, there must be some reasonable showing of negligence to require the submission of that issue to the jury. Where the offending appliances or instrumentalities are shown to have been under the exclusive control of the defendant, and the accident in its nature, circumstances, and surroundings is such as in ordinary course would not occur with reasonable care on the part of the defendant, then, in the absence of an explanation by him, the accident itself might afford a sufficient suggestion of negligence to require an application of the doctrine. But no such condition appears in this cause. Here appellant, as an employee of respondent, was himself a part of the operating forces and was in a position to have done some act which might have caused or contributed to the explosion. The maxim of *res ipsa loquitur* may be termed a rule of evidence, to the extent that, when properly applied, it raises a presumption of negligence sufficient to make a *prima facie* case on behalf of the plaintiff, and call for an explanation from the defendant. Mr. Wigmore, in Vol. 4 of his ad-

mirable work on Evidence, at § 2509, page 3556, discussing the maxim, well suggests reasonable limitations to its application, saying:

"With the vast increase, in modern times, of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed 'accident,' by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. '*Res ipsa loquitur*' is the phrase appealed to as symbolizing the argument for such a presumption. In England, a rule of that sort has for a generation been conceded to exist, for some classes of cases at least. In the United States, the presumption has spread rapidly, although with much looseness of phrase and indefiniteness of scope; as against a common carrier, the presumption against a bailee (*ante*, § 2508) has perhaps helped to confirm the rule where injury to goods or passengers is involved. What its final accepted shape will be can hardly be predicted. But the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."

Applying the second limitation mentioned, it is apparent that, at the time of this accident, inspection and user were not in control of the respondent. While we have heretofore held that, under proper circumstances and conditions, the maxim of *res ipsa loquitur* will be applied to the relation of master and servant in negligence cases, we have not held that

the mere existence of that relation calls for its application to all such cases. To do so would, in many instances, compel us to ignore the elementary principles on which the doctrine is based, and thereby unjustly place the master at the mercy of a servant who might himself be at fault.

Some exceptions are taken to rulings of the trial court on the admissibility of evidence, but we find no prejudicial error in that regard. The judgment is affirmed.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

[No. 9275. Department Two. June 2, 1911.]

JACOB ROSIN, *Respondent*, v. DANAHER LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—PRESUMPTION FROM ACCIDENT—SUFFICIENT NUMBER OF SERVANTS. The fact that a workman was injured while assisting to lower a heavy door, and the accident would not have happened if there had been more men, is not sufficient to establish negligence on the part of the master; since he is only required to exercise ordinary care in furnishing sufficient men for the work.

SAME—INSTRUCTIONS. In an action by a workman injured while assisting to lower a heavy door, through the alleged insufficiency in the number of men handling it, it is error to instruct the jury that the defendant would be liable if he did not furnish sufficient men to handle the door with reasonable safety; since he is not an insurer and need only exercise ordinary care in estimating the number of men required.

TRIAL — INSTRUCTIONS — CURING ERROR BY OTHER INSTRUCTIONS. Where the issue on defendant's negligence was whether he had furnished sufficient men to handle a door, the error in a concrete instruction that he was negligent if he did not furnish sufficient men to handle it with reasonable safety is not cured by a later abstract instruction in the most general terms as to the rule for determining the negligence of either party by reference to the conduct of ordinarily prudent men.

DUNBAR, C. J., dissenting.

[1]Reported in 115 Pac. 833.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered August 5, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill. Reversed.

Hudson & Holt, for appellant.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for respondent.

Crow, J.—Action by Jacob Rosin against Danaher Lumber Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendant has appealed.

Appellant owns a dry kiln, provided with a sliding door, about sixteen feet three inches long, and ten feet six inches wide, weighing twelve hundred pounds. Respondent was employed by appellant as an unskilled laborer. On March 5, 1910, appellant's foreman decided to remove the door and lower it to a horizontal position. For this purpose he called five workmen, including respondent. These men, with the foreman, under the latter's direction, attempted to handle the door by supporting it at arm's length with their hands and gradually moving backwards so as to bring it safely to the ground. Before the work was completed some of the men, for reasons disputed in the evidence, released their hold, whereupon the door fell and injured respondent.

The negligence charged was that appellant's foreman attempted to lower the door without providing a sufficient number of men to safely perform the work. It was also alleged that methods selected were unsafe and dangerous. Appellant's first contention is that the trial court erred in refusing its motions for a nonsuit and a directed verdict. In support of these motions it insists the evidence was insufficient to sustain any finding of negligence on appellant's part. We have carefully examined all the evidence, and without dis-

cussing it, will state that we conclude the question of appellant's alleged negligence in failing to provide a sufficient number of men was for the jury.

The trial judge instructed the jury as follows:

"In the performance of the work of handling heavy objects by hand it is the duty of the employer to provide a sufficient number of men to handle the same in reasonable safety to the men at work, and if you find from the evidence in this case that the defendant did not have a sufficient number of men to handle the door in question with reasonable safety to the men and the plaintiff, then in that regard you can find the defendant negligent as charged by the plaintiff."

Appellant requested instructions, refused by the court, to the effect that, before respondent would be entitled to recover, it must be shown, by a fair preponderance of the evidence, that appellant's foreman knew, or in the exercise of reasonable care and ordinary prudence should have known, the men directed to lower the door were insufficient in number. Appellant now contends the trial judge erred in the instructions given, and in refusing those requested. It argues that the instructions given made it an insurer of the sufficiency of the number of men engaged, and informed the jury that appellant would be responsible should the men be found insufficient, regardless of the fact whether the foreman exercised reasonable care and prudence in determining the number required. Appellant insists that, if reasonable care and prudence were used by the foreman in determining the required number, but by reason of a mistake in judgment he fixed upon too small a number and the accident resulted from the want of more men, appellant cannot be held liable for such mistaken determination.

The particular alleged act of negligence, to support which evidence was introduced, was that appellant failed to supply a sufficient number of workmen to safely lower the door. It is elementary that a master must provide a sufficient number of servants to safely perform the required work. This duty imposed upon the master is within the rule requiring him to

provide his servant a safe place to work and safe instrumentalities with which to work; a suitable number of competent servants being as much a necessity in the way of instrumentalities as reasonably safe machinery and appliances. If the master fails to provide a sufficient number of servants to safely perform the required work, and such omission results from his failure to exercise reasonable care and ordinary caution in ascertaining and selecting the required number, he will be guilty of negligence.

"The obligation of a master to furnish reasonably safe instrumentalities for the performance of his work embraces the obligation to provide a sufficient number of servants to perform the work safely; . . ." 26 Cyc. 1292.

"The degree of care required of the master is ordinary or reasonable care, such as men of ordinary care and prudence engaged in the same or similar business on their own account are in the habit of exercising—that degree of diligence and precaution which the exigencies of the particular service reasonably require. The master is not an insurer of the competency of his servants." 26 Cyc. 1295.

See, also, *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. 243; *Peterson v. American Grass Twine Co.*, 90 Minn. 343, 96 N. W. 913.

The same principle applies in selecting a sufficient number of servants for the safe performance of any particular work, and it will be for the jury to determine from the evidence, under proper instructions, whether in selecting the number, the master has exercised ordinary and reasonable care, such as men of ordinary caution and prudence are in the habit of exercising. In *Fitter v. Iowa Tel. Co.*, 143 Iowa 689, 121 N. W. 48, a case strikingly similar to this, it was contended the master was negligent in failing to provide a sufficient force of men to handle a heavy telephone pole. The appellate court reversed the order of the trial court, by which a verdict had been directed for the defendant, but said:

"We may say, however, that the contention of appellee's counsel that to reverse the judgment below is to hold that

negligence may be inferred from the bare fact that plaintiff was injured is incorrect. The facts and circumstances under which the injury was sustained are shown with particularity. The work to be done, the method of its performance, the help furnished, the manner in which the injury was received, are all matters of evidence. Whether this showing indicated the exercise of reasonable care was a matter of fact, and not of law."

If in view of the happening of the accident, and plaintiff's contention that it was caused by an insufficient number of men to do the work, the question of an exercise of reasonable care by the master was an issue of fact for the jury, such issue should have been submitted by proper instructions for their consideration. The single fact of the happening of an accident, which would have been avoided had more servants been provided to safely perform the work, is not of itself sufficient to establish negligence of the master. It must also appear that he did not exercise ordinary or reasonable care and prudence in estimating the number actually provided as necessary for the particular work. The master is not an insurer of the number of servants required any more than he is of their competency. If he were, then to relieve him from any possible negligence in such cases as this, it would become his imperative duty to make a preliminary test, not only of the weight of objects about to be handled, but also of the physical strength and endurance of the servants detailed to perform the particular work. Such a requirement would be impracticable, and in many instances, impossible. The law only demands an exercise of reasonable and ordinary care and prudence in selecting the number of men to perform the work.

Respondent contends the instruction of which appellant complains was not erroneous, but that if it was, no prejudicial error resulted, as it was cured by other instructions given. The only other instruction upon which such a contention can be predicated with any apparent degree of reason reads as follows:

"The way to determine whether the plaintiff or defendant was negligent or not is to compare what was done or left undone by either of them with what would have been done or left undone by a man acting with ordinary prudence. If a man acts as an ordinarily prudent man would act under the same circumstances and conditions, there is no negligence; if a man fails to act as an ordinarily prudent man would act under the same circumstances and conditions, there is negligence."

This instruction is an abstract statement, in most general terms, of a rule to be employed by the jury in determining whether either appellant or respondent was negligent, and does not correct the concrete instruction previously given, which declared a specific act on appellant's part to have been negligent without regard to the question whether its foreman did or did not exercise reasonable or ordinary care and prudence. In other words, when the trial judge had expressly informed the jury that putting an insufficient number of men to work was negligence, and thus characterized and defined as negligence appellant's very acts to which respondent and his witnesses had testified, it would not be reasonable, fair, or logical to say the error thus committed was cured by a later instruction whereby the jury were told a person would not be negligent if he acted as an ordinarily prudent man would act under the same circumstances and conditions, and that if he did not so act, he would be negligent. By the first instruction the jury were advised that the doing of a specific act was in itself negligence. By the second or supposed curative instruction, negligence was generally defined to be a failure to act as a person of ordinary prudence. Considered together, the logical conclusion would be that the person who did the specific act did not in its doing act as an ordinarily prudent man would under the same circumstances and conditions. *Kirby Lumber Co. v. Dickerson*, 42 Tex. Civ. App. 504, 94 S. W. 153, is especially pertinent. The defendant was charged with negligence in having failed to provide a proper foundation for a stack

of lumber which fell upon the plaintiff. The trial court erroneously instructed the jury on the duty of the defendant to provide a reasonably safe foundation. It was contended in the appellate court that other instructions cured the error. The several instructions quoted in the opinion are in form and principle similar to those here involved. The Texas court of civil appeals, in holding the error had not been cured, said:

"It is insisted by appellee that in other paragraphs of the court's charge the jury were properly instructed that appellant was to be held responsible only for the failure to exercise ordinary care. These instructions, which it is claimed so modified the doctrine laid down in those paragraphs of the charge hereinbefore quoted, as to relieve the charge, taken as a whole, of any injurious consequences to appellant, are as follows: 'The mere fact that an accident happens or an injury occurs, is not of itself proof of negligence, and millmen are not, under the law, required to use the highest possible degree of care and caution of which the human mind can conceive, or such degree as would prevent every possible accident, but they are only required to exercise ordinary care and diligence.' 'You are charged that the defendant is not to be held as an insurer of its employes against accident by reason of unsafe or insufficient foundations under its lumber piles, but is by the law only required to use ordinary care and caution to construct safe foundations, and to keep them in such condition.' These instructions unquestionably contain a proper statement of the law. The question to be determined is as to their effect in counteracting the effect of those portions of the charge objected to. The jury, by the instructions contained in the charge, taken as a whole, are required to measure appellant's responsibility by two entirely different and inconsistent standards. If they adopted one, they had to discard the other. If they endeavored to reconcile them, it is not improbable that they may have construed the charge to mean, as a whole, that, while appellant was only required to exercise ordinary care, such ordinary care required is, as matter of law, to provide such reasonably safe foundations for the lumber stack as is commonly used by skilled and experienced mill men and such as they could by the use of ordinary skill, provide. They might

reasonably understand the charge, taken as a whole, arbitrarily and as a matter of law, to fix the standard of ordinary care imposed upon appellant by an absolute requirement to provide reasonably safe foundation for the stack. So understood, those portions of the charge referring to the exercise of ordinary care by appellant would in no degree have modified the objectionable portions of the charge."

The two instructions here given, in effect, told the jury, (1) that a person not acting with ordinary care and prudence is negligent; (2) that one who provides an insufficient number of men is negligent. From the two thus given, the natural conclusion would be that a person who provided an insufficient number of men did not act with ordinary care and prudence and was necessarily negligent. Thus, it appears that the issue whether appellant's foreman acted with reasonable or ordinary care and prudence was not properly submitted to the jury.

The judgment is reversed, and the cause remanded for a new trial.

MORRIS and CHADWICK, JJ., concur.

DUNBAR, C. J., dissents.

[No. 9408. Department One. June 2, 1911.]

In re Estate of ELLEN PEIRCE.

MARY FARLEY, *Appellant*, v. B. ELIZABETH DRAKE, *Respondent*.[1]

WILLS—PROBATE—PETITION—NECESSITY. Where a will has been filed with the clerk of the court, the court may take proof and probate the will without the filing of any formal petition by an interested party, under Rem. & Bal. Code, §§ 1297, 1288, providing for the immediate probate of wills offered, and that wills filed may be opened and retained for probate.

WILLS—REVOCATION—"WILL"—SUFFICIENCY OF WRITING. Under Rem. & Bal. Code, § 1322, providing that no will in writing shall be revoked except by a subsequent will in writing, a will may be re-

[1]Reported in 115 Pac. 835.

voked by a writing executed with the solemnity of a will, although the revocation is not a will in the technical sense of making a disposition of any property.

Appeal from an order of the superior court for Pierce county, Chapman, J., entered December 20, 1910, admitting a so-called will to probate and revoking the probate of a prior will, after a hearing before the court. Affirmed.

Jas. J. Anderson (*Burdick & McQuesten*, of counsel), for appellant.

F. Campbell, for respondent.

Gose, J.—On August 31, 1908, Ellen Peirce, now deceased, made her will, and on the following day filed it in the office of the clerk of the superior court of Pierce county, it being the county of her residence, and received the clerk's certificate therefor, conformably to the provisions of the code (Rem. & Bal. Code, § 1287). On the 26th day of September, 1910, upon the application of her attorney, it being shown that the certificate could not be found, an order was entered in the superior court of Pierce county, directing the clerk to deliver the will to such attorney, and it was so delivered. On the 29th day of October, 1910, the date of her death, Ellen Peirce executed an instrument which, omitting the certificate of acknowledgment, is as follows:

"I, Ellen Peirce, of Tacoma, Pierce County, state of Washington, do hereby revoke any and all wills heretofore made and executed by me, and do hereby declare any and all wills heretofore made and executed by me null and void and of no effect.

"In witness whereof I have hereunto set my hand and seal this 29th day of October, 1910.

"Executed in presence of Ellen Peirce.
"R. W. Jamieson.
"Ellen Johnson."

This instrument was filed with the clerk of the superior court of Pierce county on October 31. On November 15, 1910, the will first mentioned was admitted to probate, and

one Mary Farley, the person nominated therein as executrix, was appointed as such. On November 18, in pursuance of the petition of such executrix and the order of the court, a citation was issued and served upon one B. Elizabeth Drake, commanding her to appear in the court of probate of Pierce county on the 28th day of November, for the purpose of being examined under oath touching certain documents which the petition charged to be in her custody. On November 25 she filed in the proceeding a motion and petition, wherein she moved to quash the citation and to annul the probate of the will. In the petition she alleged the filing of the will with the clerk, and its withdrawal in pursuance of the order; that the testatrix did not direct a refiling; that after its withdrawal and while it was in her possession, she executed and filed the paper writing which we have quoted, and alleged that it was then on file in the office of the clerk of the court. The petition further states that the first will was refiled with the clerk of the court on November 2, by some person who knew it had been withdrawn at the instance of the testatrix, and that the revocation had been filed.

In response to a citation issued upon the last mentioned petition, Mary Farley appeared and demurred thereto, on the ground, (1) that the petitioner has no capacity to sue; and (2) that the petition does not state facts sufficient to entitle the petitioner to any relief. The demurrer was overruled, and the demurrant was given five days to plead further. Failing to further plead, a default was entered against her on December 14. The order of default recites the making and filing of the paper writing which we have set forth, and that it was then a part of the records of the court, and directed the witnesses who attested it to appear on December 20 to prove its execution. In obedience to the order, the witnesses appeared as required, and gave evidence that the testatrix signed and published it as her last will and testament in their presence, and that they, at her request and in her presence and in the presence of each other, subscribed

their names as witnesses thereto, and that she was of the age of sixty-nine years, of sound and disposing mind, and not acting under duress, fraud, undue influence, or misrepresentation. Mary Farley objected to the admission of the evidence, on the grounds, (1) that the petitioner has no such interest in the will as to entitle her to prove it; (2) that it is not a will or a codicil; and (3) because the proceeding was not based upon any verified petition. She sought to make her appearance special, but as we have seen, she had theretofore entered a general appearance. An order was thereupon entered, admitting to probate the instrument last executed by the testatrix as her last will and testament, and annulling and revoking the probate of the earlier will. Mary Farley has appealed.

The point first made is that the petitioner, Drake, has no such interest in the will as to warrant a contest on her part. We do not regard the proceeding as a contest. The statute, Rem. & Bal. Code, § 1297, provides that, when a will is exhibited to be proven, the court may immediately receive the proof and grant a certificate of probate. Section 1288 provides that, when a will is on file with the clerk, it shall, after the death of the maker, be opened in public, before witnesses, by the judge of the court, and may be retained for probate. It is apparent that the statute does not require the filing of a formal petition by a party in interest, although that method is usually followed. Both wills were proven before the same judge. The petition called his attention to the fact that a later will had been filed with the clerk of his court, and it was competent for him to take the proof and determine whether it had been properly executed and, if so, its nature and effect.

The principal question presented is, whether the later instrument is a will within the meaning of the code (Rem. & Bal. Code, § 1322). This section provides that no will in writing shall be revoked except by a subsequent will in writing, or by burning, etc. The appellant contends that the in-

strument is not a will because it makes no disposition of property. At common law parol revocations of written wills were permitted, and the statute of 29 Car. 2, was enacted to prevent frauds and perjuries. *Kent v. Mahaffey*, 10 Ohio St. 204. Our statute was enacted for the same purpose. The ordinary conception of the term "will," as applied to a testament, is the formal instrument by which a person disposes of his property, to take effect at his death. We do not think the word was used in this statute in its technical sense. As here used, it means a writing executed with the solemnity of a will. If the appellant's view is sound, then a party who has made a will and who desires to die intestate and have his property descend under the statute, if the will cannot be found so that it can be destroyed, would be required to make a new will which he did not intend to be operative, and then burn, tear, or cancel it. It is apparent that the legislature did not intend a construction that would lead to such absurd consequences. It has been held that, when a will has been properly executed but has no operative force on account of some incapacity in the devisee to take, it will nevertheless revoke a former will. *Laughton v. Atkins*, 1 Pick. 535. All the formalities required by Rem. & Bal. Code, § 1320, for the execution of a will were complied with in the execution of the revocation which we have set forth, and this we think meets the requirements of the statute.

The judgment is affirmed.

Dunbar, C. J., Mount, and Parker, JJ., concur.

[No. 9373. Department Two. June 2, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Palmer Mountain Tunnel & Power Company, Plaintiff*, v. THE SUPERIOR COURT FOR OKANOGAN COUNTY, *Respondent*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—SERVICE AND FILING. Under Rem. & Bal. Code, § 389, providing that appellant must file a proposed statement of facts and serve a copy thereof on the adverse party, the filing must precede the service or the statement will be struck out (CHADWICK, J., dissenting).

SAME—SERVICE BY MAIL—COMPLETION OF SERVICE. Under Rem. & Bal. Code, § 247, providing that service by mail shall be made by depositing a copy addressed to the person on whom it is served etc., without specifying when the service shall be deemed complete, service of a statement of facts by mail is completed when the copy is deposited in the post office properly addressed.

Application filed in the supreme court January 27, 1911, to compel the superior court for Okanogan county, Pendergast, J., to certify a statement of facts. Denied.

Dewart & Fouts, for relator.

P. D. Smith, for respondent.

MORRIS, J.—Application for a writ of mandamus, directing the respondent judge to certify a statement of facts. The petition shows that, on July 1, 1910, the Pacific Tank Company recovered a judgment against relator in the superior court for Okanogan county, from which the relator sought to take an appeal to this court, and as a necessary step in such appeal, prepared a statement of facts. The attorney for relator resided at Spokane, while the attorney for the tank company resided at Conconully. On October 1, 1910, the attorney for relator deposited his proposed statement of facts in the post office at Spokane, addressed to the clerk of the superior court for Okanogan county, at Con-

[1]Reported in 115 Pac. 845.

conully, with postage fully prepaid. At the same time and place he deposited a copy of such proposed statement, addressed to the attorney for the tank company, at Conconully, with postage fully prepaid. These statements were received in due course of mail at Conconully, on the evening of October 4, after the clerk had closed his office for that day, and for that reason the clerk did not file the proposed statement until the morning of October 5. On December 29 the attorney for the tank company moved to strike the proposed statement of facts, upon the ground, among others, that said proposed statement of facts was not filed before it was served, which motion was granted by the court, and the proposed statement stricken January 14, 1911.

Rem. & Bal. Code, § 389, provides that a party desiring to have a statement of facts certified must prepare the same as proposed by him, file it in the cause, and serve a copy thereof on the adverse party; and this court, in construing such section, has held in *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241; *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344; *Barkley v. Barton*, 15 Wash. 33, 45 Pac. 654; *State v. Yandell*, 34 Wash. 409, 75 Pac. 988, that the proposed statement must be filed before it is served. This has been the established practice of this court and should be adhered to. It is necessary for us to determine, then, when the proposed statement was served on the attorney for the tank company. Section 246, Rem. & Bal. Code, provides that:

"Service by mail may be made when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail."

Section 247, Rem. & Bal. Code, provides:

"In case of service by mail, the papers shall be deposited in the post office, addressed to the person on whom it is served, at his place of residence, and the postage paid; and in such case the time of service shall be double that required in case of personal service."

Under these sections the service is made by mail when the paper to be served is deposited in the post office addressed to the person to be served, with postage prepaid, and the service is complete when so deposited; otherwise there could be no meaning to the sections. This is the universal interpretation given to such statutory provisions.

In California it is provided that the service shall be complete when the paper is deposited in the mail; while in Iowa the statute reads that the service shall not be deemed complete until the arrival of the first regular mail at the place where the person to be served resides. But, in construing statutes where, as in ours, there is no time fixed when service shall be deemed complete, it is universally held that it must be determined as of the time when the papers are properly mailed. 19 Ency. Plead. & Prac. 696, citing many New York cases under a similar statute; 31 Cyc. 595; *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512; *Carlson v. Stuart*, 22 S. D. 560, 119 N. W. 41; *Van Aernam v. Winslow*, 37 Minn. 514, 35 N. W. 381, under a statute identical with ours; *Lyon County v. Washoe County*, 8 Nev. 177. We are, therefore, of the opinion that the service of the copy of the proposed statement of facts was made upon the attorney for the tank company on October 1, when the same was deposited in the post office at Spokane, properly addressed to him at Conconully, with prepaid postage. Under this holding, the service preceded the filing, and the proposed statement was, for this reason, properly stricken.

Counsel for relator relies upon *Bank of Shelton v. Willey*, 7 Wash. 535, 35 Pac. 411, which holds that a statement of facts is "filed," within the meaning of the statute, when it is actually received by the clerk, and that notice of filing same is sufficient if deposited in the mail in sufficient time to have reached counsel served, within the required time, although actually received too late. The first of these holdings would be authoritative for holding that, as the clerk received the proposed statement of facts on October 4, it was filed that

day, although he did not mark it "filed" until the next day, which would be of no value to relator. The second holding would seem to indicate that the court was then of the opinion that the notice of filing was sufficient if mailed in time, irrespective of its receipt; which is more authoritative for our present holding that the mailing of the paper, rather than its receipt, determines the time of service. Otherwise, as the paper was admittedly received too late, if its receipt determined its service, it could not have been served in time; but having been mailed in time, it was served in time.

The writ is therefore denied.

CROW and MOUNT, JJ., concur.

ELLIS, J. (concurring)—I concur solely on the ground that this opinion follows the earlier decisions of this court. Were the question a new one I would favor a less technical construction of the statute.

CHADWICK, J. (dissenting)—I dissent. The earlier cases holding that a statement of facts should be "filed and served," and that a notice of appeal should be "served and filed," upon which the majority opinion is made to rest, have no foundation in reason and find no sanction in the statute. Sections 389 and 1719, Rem. & Bal. Code, merely declare that an appeal shall not be allowed unless a notice of appeal and a statement of facts shall have been both served and filed. If either requirement were lacking, the appeal might properly be denied. With both acts accomplished, the object of the statute is attained, and the proceeding should go free of hyper-technical objections. Had the legislature intended that there should be any virtue in "filing" and "serving," before "serving" and "filing," it would have so ordained. That no reason occurred to the legislature is made manifest when it provides in one statute that the statement of facts shall be "filed and served," and in the other that the notice shall be "served and filed." If there is any meat of wisdom or strength of necessity in filing or serving the one before the

other, it was not apparent to the legislature; and so far the courts have not pointed it out. When the documents, as in this case, were both served and filed, the act, not the time—except as the act done is within the statutory limit—being the essential thing, the writ should issue. It is true that many sessions of the state legislature have passed since the first decisions were announced by this court; but no rule of property is involved, it is a question of practice only, and the omissions of the legislature in such cases should not deter the court from overruling the cases here involved and declaring in their stead a "rule of reason."

[No. 9351. Department One. June 3, 1911.]

J. S. CLEMMONS *et al.*, *Appellants*, v. GEORGE H. McGEER, *Respondent*.[1]

PLEADING—REPLY—DEPARTURE—QUIETING TITLE. In an action to quiet title, in which the complaint alleged that defendant claims some interest adverse to the plaintiffs, which was without right, and the defendant answered claiming title under a deed from the plaintiffs, it is a fatal departure, authorizing judgment for the defendant on the pleadings, for the plaintiffs to reply that the deed, executed in blank, was fraudulently procured by one B. and wrongfully delivered to defendant as security for a loan to B. for not more than $650, and that if defendant had any interest at all, it was only as a mortgagee (GOSE, J., and DUNBAR, C. J., dissenting).

DEEDS—EXECUTION IN BLANK—DELIVERY. The execution and delivery of a deed in blank authorizes the party to whom it was intrusted to fill in the name of a grantee and vests title in the grantee.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 1, 1910, dismissing on the pleadings an action to quiet title. Affirmed.

J. B. Keener, for appellants.

Ellis, Fletcher & Evans, for respondent.

[1]Reported in 115 Pac. 1081.

PARKER, J.—The question involved in this appeal is whether or not the trial court erred in dismissing the case upon the ground that the plaintiffs' reply to the affirmative defense of the defendant's answer constituted a departure from the allegations of the complaint.

The plaintiffs allege in their complaint, in substance, that they are the owners of certain land in Tacoma; that the defendant claims some interest therein adverse to them; that such claim of the defendant is without any right whatever; and pray that they be declared to be the owners of the land, and that the defendant have no estate or interest therein.

The defendant, in his answer, denies the ownership of the plaintiffs in the land, and alleges as an affirmative defense, in substance, that he acquired title to the land by a good and sufficient warranty deed from the plaintiffs, under which he claims title thereto.

The plaintiffs, replying to the affirmative allegations of the answer, allege, in substance, that, prior to the date of the deed under which defendant claims title to the land, they entered into a contract with one Bell, by which he was to furnish the material and erect a building for them upon other land belonging to them, for which he was to be paid in part by a conveyance of the land here involved; that when the building was partially constructed, Bell requested a conveyance of this land in part payment thereof, representing to the plaintiffs that the material furnished for, and work done upon, the building was paid for to the extent of $725, the agreed value of the land here involved, and which Bell then asked to have conveyed to him; that relying upon the representation of Bell, the plaintiffs executed a deed for the land, leaving the name of the grantee blank; that Bell was then unable to procure receipts for more than $265 showing payment for the material furnished for and labor upon the building; that Bell then requested the plaintiffs to leave the deed with him until the next morning, when he would produce receipts aggregating $725, and relying upon this representation, the plaintiffs

did leave the deed with Bell; that upon calling at Bell's office the next morning for the purpose of receiving the receipts, they failed to find him; that they thereafter repeatedly called at his office but never found him, and never received any further receipts showing payment towards material and labor upon the building; that thereafter Bell took the deed to the defendant and obtained a loan from him in a sum not greater than $650, and as security therefor inserted the name of the defendant as grantee in the deed and delivered it to him; that thereafter plaintiffs had to expend large sums in protecting their property from liens incurred in the construction of the building; that the deed was never delivered to Bell except in the manner stated; and "that if said defendant George H. McGeer has any claim whatever, and plaintiffs deny that he has any claim at all, it is nothing more than a mortgage subsequent and junior to the interests of plaintiffs . . ."

The pleadings being in this condition, the cause was called for trial, when counsel for the defendant moved the court for a dismissal, upon the grounds, among others, "that the reply shows an absolute departure from the cause of action attempted to be set up in the complaint, and the reply pleads facts which show that the plaintiffs have no cause of action as pleaded in the complaint." This motion was granted, judgment entered accordingly, and the plaintiffs have appealed.

It has become the settled law of this state, in keeping with the general rule elsewhere, that a plaintiff cannot, over the objections of his adversary, by any pleadings subsequent to his complaint, bring into the action for adjudication any cause of action different from that set forth in his complaint. *Distler v. Dabney*, 3 Wash. 200, 28 Pac. 335; *Bell v. Waudby*, 4 Wash. 743, 31 Pac. 18; *Clark v. Sherman*, 5 Wash. 681, 32 Pac. 771; *Osten v. Winehill*, 10 Wash. 333, 38 Pac. 1123; *Gile v. Baseel*, 38 Wash. 212, 80 Pac. 437; *Smart v. Burquoin*, 51 Wash. 274, 98 Pac. 666; *Spokane Grain Co. v. Great*

Northern Express Co., 55 Wash. 545, 104 Pac. 794. The rule is stated in 6 Ency. Plead. & Prac., p. 461, as follows:

"A plaintiff in an action must recover, if at all, upon the cause of action stated in his declaration or complaint, and a replication or reply that sets up a different cause of action from that declared on is bad for departure. The office of a replication or reply is to meet the allegations of the plea or answer, and it cannot, in ordinary cases, introduce, as a basis for affirmative relief, matter enlarging the grounds upon which recovery was originally sought. This can be done only by amendment of the original pleading."

It seems to us that the allegations of this reply affirmatively show that appellants are not entitled to have their title quieted as against the claim of respondent, since those allegations show that respondent has a valid conveyance for the land amounting at least to a mortgage securing a loan to Bell, and that to this extent at least his interest is superior to that of appellants. Appellants executed the deed with the name of the grantee left blank. In this condition it was delivered into the hands of Bell by appellants, upon his promise to produce the receipts showing payment for material furnished and work upon the building to the extent of the value of the land. Bell then inserted the name of respondent in the deed as grantee and delivered it to him for value, whether as a mortgage to secure a loan or an absolute conveyance we need not now determine. There is no allegation of any knowledge on the part of respondent as to the manner in which Bell acquired possession of the deed, nor of fraud of any nature on the part of respondent indicating that he was other than an innocent purchaser or mortgagee of the land. The possession of the deed by Bell was such *prima facie* evidence of its delivery as, we think, entitled respondent to assume that it had been delivered to Bell for the purpose of conveying title to the land. *Richmond v. Morford*, 4 Wash. 337, 341, 30 Pac. 241, 31 Pac. 513. Now, had Bell's name been inserted in the deed at the time it was executed by appellants, and had Bell

then conveyed by deed of his own to respondent, clearly respondent would have acquired an interest in the land as an innocent purchaser or mortgagee. It seems to be well settled that a deed, in which the name of a grantee is left blank and otherwise lawfully executed, will vest title in a person whose name is subsequently inserted therein by one having authority from the grantor so to do. In this case, we think the authority of Bell to insert respondent's name in the deed as grantee must be determined from the view that the respondent was entitled to take of Bell's authority from the fact of Bell's possession of the deed. The supreme court of Iowa, in the case of *Hall v. Kary*, 133 Iowa 465, 110 N. W. 930, 119 Am. St. 639, dealing with the question of this presumption of authority of one in possession of a deed with a blank for the insertion of the name of a grantee, said, at page 468:

"It appears beyond controversy that plaintiff left the instrument which had been thus executed by him and his wife with Chamberlain, and accepted and retained possession of a conveyance of property in exchange for that in question; and it must be presumed that, although plaintiff's deed was blank as to grantee, the intention was to vest Chamberlain with title to the property described therein, and authorize him to insert the name of a grantee as he should see fit. That a deed thus left blank as to the grantee, being otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance is well settled in this state. *Swartz v. Ballou*, 47 Iowa 188; *Logan v. Miller*, 106 Iowa 511; *McClain v. McClain*, 52 Iowa 272; *McCleery v. Wakefield*, 76 Iowa 529."

See, also, *Creveling v. Banta*, 138 Iowa 47, 55, 115 N. W. 598; *Burk v. Johnson*, 146 Fed. 209, 219; *State v. Young*, 23 Minn. 551; *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132.

We are of the opinion that the respondent had a right to assume that Bell was authorized to insert the name of a grantee in the deed and deliver it to such grantee, and that respondent thus acquiring the deed without fraud on his part, and for value, acquired an interest in the land. It thus appearing from the allegations of the reply that respondent

has an interest in the land, the prayer of plaintiffs' complaint must of necessity be denied, since the plaintiffs' title cannot be quieted as against this claim. In this respect the reply is not only a departure from the cause of action set up in the complaint, but it affirmatively shows that there is no such cause of action in plaintiffs' favor. Whether or not appellants are entitled to have the deed declared to be a mortgage only, securing to respondent a loan to Bell, is a question that cannot be litigated in this action, because it is a different cause of action from that pleaded in the complaint, and hence, is in any event a departure within the rule.

The judgment is affirmed.

MOUNT and FULLERTON, JJ., concur.

GOSE, J. (dissenting)—I do not think the reply shows such a departure from the cause of action stated in the complaint as to justify a dismissal of the case. The complaint alleges ownership in the plaintiffs. The answer alleges ownership in the defendant. The reply, in effect, alleges: (1) that the defendant's deed was procured by means of fraud; and (2) that if it is effective for any purpose, it is a mortgage for a sum not to exceed $650. If the plaintiffs can establish any of the facts stated, they can quiet their legal title. The fact that, under a certain contingency, they cannot get all the relief prayed for in the complaint does not defeat their action. This view is supported in principle by *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609. While I do not commend the plaintiffs' pleadings as a model for the bar of the state, I think that an issue is joined which should be determined by the court. I therefore dissent.

DUNBAR, C. J., concurs with GOSE, J.

[No. 9470. Department Two. June 5, 1911.]

THERESE LUTKENS *et al.*, *Respondents*, v. J. W. YOUNG, *Appellant*.[1]

PROCESS—SERVICE BY PUBLICATION—JURISDICTION—AFFIDAVITS. A service by publication without mailing copies to the defendant does not confer jurisdiction unless it is stated in the affidavit for publication that defendant's residence is not known.

SAME—AMENDMENT OF DEFECTS. The failure of an affidavit for publication to state that the residence of the defendant was not known, where copies were not mailed, being a jurisdictional defect, is not capable of amendment after judgment by the filing of another affidavit.

JUDGMENT—RECITALS—JURISDICTION—PROCESS. Recitals in a judgment of due service by publication, "after filing of an affidavit for publication by the attorney for the plaintiff," are not sufficient to overcome jurisdictional defects appearing on the face of the affidavit for publication, where there was a subsequent affidavit of the plaintiff's attorney affirmatively pointing out the defect and making it appear that there was no other affidavit in the record to confer jurisdiction.

SAME—PRESUMPTION OF JURISDICTION. The presumption of due service of process from recitals in the judgment is only *prima facie* and may be overcome by an affirmative showing.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 3, 1910, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quite title. Reversed.

Reynolds & Stewart, for appellant.

Forney & Ponder and *Hayden & Langhorne*, for respondents.

MORRIS, J.—In this action the respondents sought to quiet title as against appellant, and being successful in the lower court, we are asked to review the judgment upon assignments of error, one of which is jurisdictional and, if allowed, defeats the judgment.

[1]Reported in 115 Pac. 1038.

Appellant, who had obtained his title to the property in controversy through a sheriff's deed under an execution obtained upon a judgment against Fred W. Muller, attacked a judgment of foreclosure of mortgage under which respondents claimed to derive title, by claiming in his answer that the judgment was invalid in that no jurisdiction was obtained over Fred W. Muller, the mortgagor, such jurisdiction being based upon a service by publication in which the affidavit required by the statute was fatally defective, in failing to state that the residence of said Muller was not known to the affiant, as required by Rem. & Bal. Code, § 228, which requires, among other provisions, that the affidavit in such cases must not only show the nonresidence of the defendant, which may be shown upon belief, or that the defendant cannot be found within the state, but must further state that a copy of the summons and complaint has been deposited in the post office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known.

It is the rule in this state, as in most others, that, where jurisdiction is sought to be obtained through a service by publication, the affidavit required by the statute shall be in strict compliance with all the statutory requirements, and that an affidavit which fails in any of these essentials will not support a publication of summons, nor confer jurisdiction through such publication; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Felsinger v. Quinn*, 62 Wash. 183, 113 Pac. 275; the reason for such a rule being that, constructive service being of purely statutory creation and in derogation of the common law, the statutes authorizing such service must be strictly pursued in order to confer jurisdiction. *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462, and cases cited.

Respondents attempt to meet this situation, (1) by showing that, some two years after the defective affidavit was filed and sixteen months after the entry of judgment, an amended affidavit was filed, reciting that on October 8, 1907, the date of the first affidavit, the affiant did not know the residence of

Fred Muller and so intended to state, but through inadvertence failed to do so. It does not appear to us that this is a defect that can be remedied by amendment. The jurisdiction of the court depended upon a substituted service, which was no service unless the statutory requirements and essentials affecting it had been fully complied with. The court had no jurisdiction from the beginning, and this jurisdiction could not be conferred by amendment so long after the entry of judgment. *Ladenburg v. Commercial Bank of Newfoundland*, 33 N. Y. Supp. 821; *Foster v. Electric Heat Regulator Co.*, 37 N. Y. Supp. 1063; *Ellis v. Fletcher*, 40 Mich. 321; *Thompson v. Moore*, 12 Ky. Law 664, 15 S. W. 6, 358.

There are many defects that sometimes affect judgments that may be cured by amendment; such as the affidavit or return of service, because jurisdiction is obtained from the service itself and not from the proof of service. So the affidavit of publication of summons, or other errors or defects in the record, however important a part of the record, may be cured by amendment when they occur through the act or omission of the clerk of the court in entering, or in failing to enter, of record; and many other like matters might be cited in which the right to amend is recognized. Freeman, Judgments, §§ 71, 89b; 32 Cyc. 540.

But we know of no instance, where jurisdiction is lacking, where it is held that jurisdiction may be conferred by amendment. It was held by us in *Felsinger v. Quinn*, *supra*, in adopting the rule as announced in *Gilmore v. Lampman*, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. 373, in construing a similar statute, that the affidavit must be complete in itself as to all material matters, and cannot be aided by reference to other papers of record. Respondents cite cases from Kansas where amendments to the affidavit for publication have been permitted, and an examination of those cases and others from the same state shows such to be the rule in that state.

In *Harris v. Claflin*, 36 Kan. 543, 13 Pac. 830, it is said that the rule there adopted is:

"If there is a total want of evidence upon a vital point in the affidavit, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable;"

and in the latter cases the defect may be cured by permitting an amended affidavit to be filed. The affidavit before us failed to show the mailing of a copy of the summons and complaint. It was silent as to the residence of Muller not being known, so as to excuse the mailing of such copies, as demanded by the statute, except such residence be unknown. It was therefore within the Kansas rule, in that there was "a total want of evidence upon a vital point," and hence, under those authorities, no jurisdiction was conferred, and the judgment was void.

It is next contended that the defect is cured by the recitals in the judgment of due and legal service of summons by publication, "after filing of an affidavit for publication by the attorney for the plaintiff, stating the matters required by statute;" and citation is made of the many authorities in this state where it has been held that such recitals cured alleged defects in the judgment. It will be found, however, that such a rule has only been announced where there was nothing in the record to contradict the recitals of the judgment, and the judgment was being collaterally attacked.

"Under this rule the evidence upon which the court based its finding need not appear affirmatively in the record. It is enough if the contrary does not appear." *Wick v. Rea, supra.*

citing the cases relied upon by respondents. It is likewise said in that case:

"The converse of this rule follows, and is sustained by the same authorities. So that, although the judgment recites jurisdiction, if a want of jurisdiction affirmatively appears

upon the face of the whole record, the judgment will be held to be void upon collateral as well as direct attack."

So that, as in *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20, the recital of due service is not contradicted by merely showing that a summons which was legally insufficient had in fact been published, where it appeared there was ample time after the completion of such publication for another and sufficient summons to have been issued; and in the absence of any evidence, this court would presume, in aid of the judgment and as against collateral attack, that such was the fact.

"Every fact not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it." *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205.

In *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264, upon which respondent strongly relies, the publication of summons was based upon an affidavit of F. S. Blattner, as attorney for plaintiff, to the effect that he did not know where the defendant resided. It was contended that, as the plaintiff had several other attorneys of record, and there was nothing to show that they did not know, or that the plaintiff did not know, where the defendant resided, the showing was insufficient. The court said that the recital of due service created a presumption of valid service, and we would be bound to presume that other and sufficient affidavits were filed. So in all the cases where this rule has been applied there was no affirmative showing to contradict the recitals of the judgment, and that has been the controlling reason why such recitals have been given effect by the court. In this case the recitals are contradicted by an affirmative showing in the record. That the defective affidavit was the only affidavit, and the one relied upon to obtain service by publication, is affirmatively shown when the attorney for respondent, confessing its insufficiency to support a valid publication, attempts to

remedy the defect. We cannot then presume, as in the *Christofferson* case, that there were other and sufficient affidavits filed, when the attorney who made and filed the first affidavit, and who is presumed to know the record upon which he obtains his judgments, makes it to appear that there is no other affidavit, and that the one first relied upon is insufficient to confer jurisdiction. The presumption of due service from recitals being only *prima facie*, *Holly v. Munro*, 55 Wash. 311, 104 Pac. 508, 133 Am. St. 1028, is overcome by an affirmative showing.

We are, therefore, of the opinion that the judgment under which respondent claims title was void, and the judgment herein is for such reason reversed.

CROW, CHADWICK, and ELLIS, JJ., concur.

[No. 9222. *En Banc.* June 7, 1911.]

WILLIAM L. BILGER *et al.*, *Respondents*, v. THE STATE OF WASHINGTON *et al.*, *Appellants*.[1]

NAVIGABLE WATERS — RIPARIAN AND LITTORAL RIGHTS. Under Const., art. 17, § 1, wherein the state asserts the ownership of the bed and shores of all navigable waters in the state to high water mark, the owner of upland under patents from the Federal government has no riparian or littoral rights as against the state, which holds the title of the beds and shores in fee, free from incumbrances or easements of any kind.

NAVIGABLE WATERS—SHORES AND BEDS—TITLE—CONVEYANCE FROM STATE. Abutting upland owners on a navigable lake, who purchased the shore lands from the state after the state had granted to the United States the right to lower the waters of the lake, take subject to such right.

NAVIGABLE WATERS—STATE GRANTS—LICENSE OR EASEMENT. An act of the state legislature in aid of a ship canal, granting to the United States the right to lower the waters of a navigable lake, is the grant of an easement, rather than a mere revocable license.

[1]Reported in 116 Pac. 19.

SAME—LICENSES—REVOCATION. A license by the state to the United States to lower the waters of a lake, in aid of the construction of a canal, is one coupled with an interest, and not revocable, where the United States made and expended appropriations for the work on the faith thereof.

NAVIGABLE WATERS—RIGHTS OF ABUTTERS—LOWERING WATERS—AUTHORITY. Where the Federal government has been granted authority to lower the waters of a lake by a canal, abutters on the lake cannot object that the work is being done by the state and county, where the state and county are doing the work on behalf of the Federal government, to whom it will belong when completed.

STATES—USE OF FUNDS. The state can lend its aid to enterprises undertaken by the Federal government.

CANALS—CONSTRUCTION BY FEDERAL GOVERNMENT—STATUTES. The intention of the Federal government to undertake the work of constructing a ship canal within the requirements of a state act providing therefor, is sufficiently shown by Federal appropriations amounting to over two and a quarter millions of dollars for the purpose.

CONSTITUTIONAL LAW—DUE PROCESS—ASSESSMENTS FOR IMPROVEMENTS. Property is not taken without due process of law by the act of 1907, p. 582, which provides for the construction of the Lake Washington canal at the expense of property benefited, after an assessment with a hearing before a board empowered to equalize the assessment and right of appeal to the courts.

CONSTITUTIONAL LAW—CLASS LEGISLATION. An act authorizing a county to levy assessments upon lands benefited by a ship canal does not violate Const., art. 1, § 12, prohibiting the granting of special privileges and immunities to any citizens or class of citizens or corporations other than municipal, since a county is a municipal corporation.

STATES—USE OF FUNDS. Federal Const., art. 1, § 10, does not restrict the power of the state to aid in enterprises undertaken by the Federal government.

EMINENT DOMAIN—COMPENSATION — ASSESSMENTS FOR BENEFITS. An act authorizing the assessment of property benefited by a local improvement relates to the taxing power, and not to the taking or damaging of private property for a public use without compensation, prohibited by Const., art. 1, § 16.

COUNTIES—IMPROVEMENTS—POWER TO MAKE. The limitations of Const., art. 7, § 8, upon the power of cities, towns, and villages, to make local improvements has no application to counties.

COUNTIES — OFFICERS — ASSESSMENT — COMMISSIONERS. Commissioners to equalize a county assessment for the construction of a

ship canal are not county officers, within Const., art. 11, § 5, requiring that all county officers be elected, and accordingly they may be appointed.

TAXATION—IMPOSITION BY STATE. An act authorizing a county to levy a special assessment for benefits accruing from a public improvement is not the imposition of a tax upon the county by the state, prohibited by Const., art. 11, § 10.

CANALS—CONSTRUCTION—STATES—AUTHORITY—STATUTES. The act of 1909, creating a special fund and appropriating moneys therefrom to be expended in the construction of the Lake Washington canal, theretofore authorized by other legislation, cannot be invoked by taxpayers as in any manner affecting the authority for the construction of the canal.

STATES—FUNDS—MISAPPROPRIATION — ACTIONS — PARTIES. A taxpayer cannot complain in equity of the misappropriation of public funds by state officers, as the attorney general is the proper person to institute such suits.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered October 28, 1910, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to enjoin proceedings for the construction of a canal, and for other equitable relief. Reversed.

W. P. Bell, Attorney General, and *W. V. Tanner, Assistant, George F. Vanderveer, Roger S. Greene, Harold Preston*, and *H. A. P. Myers*, for appellants.

Thomas A. Meade (*P. C. Sullivan*, of counsel), for respondents.

FULLERTON, J.—The respondents, who own real property bordering on the shores of Lake Washington, in King county, brought this action to enjoin the construction of a public improvement known as the Lake Washington canal, averring that the construction thereof according to the plans adopted will damage their property, and that no provision has been made for paying such damages.

To an understanding of the questions involved, a somewhat extended statement of the facts is necessary. Lake Wash-

ington, on the shores of which the respondents' property is situated, is a body of fresh water, ranging in width from two to four and one-half miles, having a length of some twenty-five miles. Its banks below the surface of the water, for the greater part descend abruptly to the mean depth of the lake, which is about two hundred feet. The normal surface level of the lake is some 31.5 feet above mean lower low water in Puget Sound. Lying immediately west of Lake Washington, is Lake Union, a body of fresh water having an area of about 900 acres, with an average depth of perhaps 40 feet, and a mean level above mean lower low water in Puget Sound of some 22.5 feet. Still further west, is Salmon Bay, which is connected directly through Shilshole Bay with Puget Sound, and is affected by the ebb and flow of the tide. The canal when constructed will connect Lake Washington with Puget Sound, passing through Lake Union, Salmon Bay and Shilshole Bay. According to the plans adopted, it is intended to raise Salmon Bay to a level with Lake Union by a lock and dam constructed across the narrows thereof, and to lower Lake Washington to a level with that lake by means of an open canal connecting the two lakes.

The government of the United States interested itself in the enterprise for the first time in 1890, when Congress made an appropriation for a survey of the route of the proposed canal. Since that time numerous appropriations have been made looking toward the completion of the enterprise, aggregating more than $550,000, and the secretary of war has been authorized to enter into a contract for the construction of locks and other accessory works at the narrows in Salmon Bay, at a cost not to exceed $2,275,000. One of the earlier appropriations was made contingent on the fact that the entire right of way for the canal be secured to the United States free of cost and free from all liability for damages arising by the construction of the canal. Later on, the government took the position that the property specially benefited by the construction of the canal should bear its just proportion of

the cost of the same, and the act making the last appropriation, if not one other, contained a proviso to the effect that the secretary of war, before beginning the work of constructing the locks and other accessory works, should be satisfied that King county, or some other local agency, would do the excavation in the waterway above the locks to the "dimensions recommended in said project," and would "secure the United States from liability for any claims or damages on the account of . . . the lowering of the level of the Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway." In compliance with the first of these requirements, the legislature of the state of Washington, in 1895, passed an act authorizing counties to condemn land "whenever the government of the United States or of this state is intending or proposing the construction, operation or maintenance of any public work . . . . and such condemnation or appropriation will enable the county to aid, promote, facilitate or prepare for such construction . . . or to fulfill or dispose of any condition upon which such construction . . . is by law or for any cause contingent." The act also provided for a tax levy to pay the cost of any such condemnation proceedings. Laws 1895, page 3.

Acting pursuant thereto, the county of King, by condemnation and purchase, acquired the right of way for a canal for the full width required by the secretary of war, and deeded the same to the United States. The cost of this proceeding does not appear in the present record, but it was shown in another action, brought to enjoin certain other proceedings had in connection with the construction of the canal, to have exceeded $225,000. In further pursuance of the same design, the legislature in 1901 passed an act granting to the United States the right to raise the waters of Salmon Bay, and the right to lower the waters of Lake Washington, in so far as the same should be necessary in the construction of the proposed canal, releasing the "United States from all

liability to damages to this state, its successors or assigns, that shall or might arise from such lowering or raising" of such waters. Laws 1901, page 7. At the time of the passage of this act, the state of Washington owned all of the shore lands bounding Lake Washington, with the possible exception of one tract which is not affected by this action.

For the purpose of enabling the agencies interested to comply with the second requirement imposed by the United States, the legislature, in 1907, passed an act providing, in substance, that whenever the government of the United States "is intending or proposing the construction or operation of any river, lake, canal or harbor improvement," the county commissioners were empowered to levy upon the property benefited by such proposed improvement an assessment "for the purpose of paying the expenses of such improvement, or so much thereof as said board of county commissioners shall determine." Laws 1907, page 582. Acting pursuant to this act, the county commissioners of King county levied an assessment to be expended on the construction of the proposed canal, fixing the amount thereof at the sum of $1,075,000, and caused an assessment district to be formed of property thought to be benefited by the proposed improvement, and levied an assessment thereon equal to the sum above named, a proportional share of which was levied upon the property of the respondents in this action. In 1909 the legislature passed an act creating a state shore land improvement fund, and appropriated out of the fund the sum of $250,000 to be expended in the "construction or improvement of what is known as the Lake Washington canal." The act provided that the sum appropriated should be subject to the order of the United States government engineer having the improvement in charge, who was authorized to expend the same in the excavation of the canal.

In August, 1909, a contract was let by the engineer in behalf of and in the name of the state of Washington, with the appellant C. J. Erickson, by the conditions of which Erickson

undertook to excavate a channel between Lake Union and Lake Washington, a distance of some two thousand feet. The specifications called for a cut varying between 70 and 80 feet in width at the bottom, with a side slope of ¼ horizontal to 1 vertical, the bottom of the cut to commence at an elevation of 25 above mean low water in Puget Sound at Lake Union, and thence gradually rise to an elevation of 40 feet above the same level at Lake Washington. This channel was completed according to contract, and another contract was let for a cut along the center line of the channel excavated under the first contract, the bottom of which was to be "at elevation 30," and the upper end, the Lake Washington end, to be cut off from the lake by a series of five gates, the tops of which are "at elevation 40," so as to permit the flow of water through the cut and at the same time control such flow. This cut was also completed.

The respondents acquired their uplands through mesne conveyances from the United States, patent issuing on September 27, 1889. They purchased the shore lands bordering thereon from the state of Washington on December 4, 1903. This action was begun in October, 1909, and such subsequent proceedings were had therein as to result in a decree entered on October 28, 1910, restraining and enjoining the defendants "from taking further proceedings to the effect and intent of excavating said Lake Washington canal, or any part thereof, or of lowering the water of Lake Washington, or of levying said assessment, or of issuing any warrants thereunder, or creating any indebtedness of said estate or county for the purpose or with the intent of excavating said canal, or for the purpose or to the end and effect of lowering the waters of said Lake Washington." This appeal followed.

The record does not advise us as to the grounds on which the learned trial judge justified the somewhat sweeping decree entered, but counsel for respondents urge in its support two principal contentions, which we shall notice in their order. The first contention is, that since the respondents own both

upland and the shore lands fronting on the borders of Lake Washington, they have riparian and littoral rights in the waters of the lake, with the right of egress and ingress to and from their lands and the waters of the lake; that the lowering of the waters of the lake, as it is intended to do by the construction of the canal, will interfere with these riparian and littoral rights, as it will cut off their right to pass to and from their lands and the waters of the lake and otherwise interfere with the use of their property; that these rights are valuable and their deprivation will damage them as owners of the land in a large sum of money; and that no compensation has been made them for such damages, nor has the same been ascertained and paid into court for their use, as required by § 16, art. 1 of the state constitution and the fourteenth amendment of the constitution of the United States.

In so far as the claim of riparian and littoral rights is based on the grant of the uplands, we have frequently held it to be without right. In its disposition of the public lands, except in isolated cases and for special purposes, the United States has never purported to convey to private grantees any portion of the beds or shores of the navigable waters. These it reserved for the benefit of the states, and on the admission of any territory in the Union as a state, the shores and beds of the navigable waters included therein became the property of the state. It was so in the territory which now comprises the state of Washington. The government grants of the uplands bordering on the navigable waters therein extended down to the line of ordinary high water only, leaving the beds and shores of such navigable waters intact, so that dominion over them could be assumed on the admission of the state into the Union. Such dominion was assumed by the state of Washington. By § 1 of art. 17 of the state constitution, the state asserted its ownership of the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water

within the banks of all navigable rivers and lakes. This title, we have frequently held, is title in fee, free from encumbrances and easements of any kind, and hence, free from any claim of the upland owner to riparian and littoral rights. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *Grays Harbor Boom Co. v. Lowndale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Lowndale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833. It follows, therefore, that such littoral and riparian rights as the respondents have in the waters of Lake Washington were acquired by them in virtue of the purchase of the shore lands made by them from the state of Washington. By a reference to the dates above given, it will be observed that the respondents acquired these shore lands on December 4, 1903, a time subsequent to the grant made by the state to the United States in 1901 conferring upon the United States the right to lower the waters of the lake. Since the respondents' title is subsequent thereto, it is necessarily subject thereto, and if the grant to the United States be valid, the respondents have no rights of property that can be affected by the lowering of the waters of the lake. The state, like any other individual owner of property, may convey its property in any manner that it deems fit. It may grant an easement therein to one party and the remaining interest therein to another. But it can make but one valid grant of the same property, hence, as we say, if it has granted to the United States the right to lower the waters of Lake Washington, it could not subsequently grant to the respondents, by a mere deed to its shore land bordering on the lake, the right to estop the United States from exercising the privilege granted.

But the respondents say that the grant to the United States conveyed nothing, that it was a mere license revocable at the pleasure of the state at any time, and that it was so revoked by the deeds of the shore lands to the respondents. An examination of the act itself will show that it was intended to be

something more than a mere license. It has all the indicia of a grant. It recites that in "aid of the construction, maintenance and operation of a ship canal by the United States of America to connect the waters of Lakes Union and Washington with Puget Sound . . . there be and hereby is granted by this state to the United States . . . the right to lower the waters of Lake Washington in prosecution of such improvement, and this state hereby releases the United States from all liability to damages to this state, its successors and assigns, that shall or might arise from such lowering . . ." It is the solemn act of the legislature of the state, and bears upon its face the approval of the state's chief executive. The privilege granted was one within the power of the state to grant, and in law we think it the grant of an easement rather than the conferring of a mere revocable license.

But if the grant were to be treated as a license we would still think it enforcible against any right acquired by the respondents. As we have elsewhere stated, some of the appropriations for the canal on the part of the United States were made on the express condition that the state should secure the United States against all claims for damages arising from the construction of the canal. This act was passed in compliance with that requirement. The government officials accepted it as such and expended the moneys appropriated on the faith thereof. The license, if it were such, would thenceforth have to be treated as one coupled with an interest, which the state could not revoke without the consent of its licensee.

It is said further that the grant is made to the United States, that the canal is being dredged by the state of Washington and King county, and that there is no privity of contract or of relation shown to exist between the United States and the state and county. But while it is true that the actual work of dredging the canal between Lakes Washington and Union is being done by the state and the county of King, it is also true that they are doing the work on behalf of the United

States. The record, as we have shown, discloses that the government has required King county or some other local agency to dredge the canal from a point above the locks to Lake Washington, and that it was in compliance with this requirement that this particular work was undertaken. But the work is nevertheless the work of the government of the United States, and the canal when completed will be the property of that government, and owned, controlled and operated by it. That the state may lend its aid to public enterprises undertaken by the government was expressly decided by this court in *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

Again, it is said that the United States has never undertaken to construct the canal, and that this court so held in *State ex rel. Burke v. Board of Com'rs*, 58 Wash. 511, 109 Pac. 350. In the case cited we did say that there was no sufficient evidence of any intention or proposal on the part of the government to construct or operate the canal, but that was said prior to the act of the 2d session of the 61st Congress, which appropriated $150,000 for that purpose, and made available for the same purpose some $2,124,000 more. This latter act set all doubts on the question at rest, and there can no longer be any question as to the intent and purpose of the government.

We need not, of course, inquire in this action what remedy the respondents have against the state on account of its failure to except this previously granted right to the United States from the conveyance it made to them of the shore lands. Whether the present normal water level marks the lake boundary of these conveyances, and their remedy is for a breach of warranty express or implied in the deed of conveyance, or whether the state actually conveyed to them all the land lying between the boundary of the uplands and the normal level of the lake as it will appear when lowered, and there was in fact no attempted conveyance of property in which it had theretofore granted an easement, must be

reserved for determination in some future action where the question is necessarily presented. We are clear, however, that the respondents took their deeds subject to the right of the United States to lower the waters of the lake to a level necessary to the successful construction and operation of a canal leading from the lake by way of Lake Union and Salmon Bay to Puget Sound, and that the respondents have no cause of action arising from the fact that the level of the lake will be lowered.

The second principal contention made on behalf of the respondents is that the act of 1907, under which the defendants purport to be acting, is in violation of both the state and Federal constitutions. It is said to violate §§ 3, 12 and 16 of art. 1; § 9 of art 7, and §§ 5 and 12 of art. 11 of the state constitution; and § 10 of art. 1, and the 5th and 14th amendments of the constitution of the United States. We shall, however, notice the contention but briefly. Elsewhere we have stated the purpose of the act. Generally speaking, this purpose was to enable a county to levy an assessment upon property benefited by a public improvement to pay a portion of the cost of constructing the improvement. The act contains provisions applicable to this general purpose. It provides for the making of an assessment, for a hearing thereon before a board empowered to equalize the assessment, and an appeal to the courts by any party aggrieved from the order of confirmation. This, to our minds, satisfies the requirements of § 3, art. 1 of the state constitution, and the 5th and 14th amendments to the Federal constitution, which forbid the deprivation of any person of life, liberty, or property without due process of law.

The objection suggested by the reference to the 10th section of art. 1 of the Federal constitution is met by what was said in the case of *Lancey v. King County, supra*, where we had under consideration the constitutionality of the act of 1895, under which the right of way for the proposed canal

was condemned by King county and conveyed to the United States. Section 12 of art. 1 prohibits the granting to any citizen, class of citizens, or corporations, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations. The applicability of this section to the act in question is not to our minds very clear, and counsel have not undertaken to enlighten us as to the precise point thought to be involved. The only privilege which we have been able to discern that is granted by the act which is not granted to all persons and corporations alike, is the vesting of power to make assessments in the counties of the state. But counties, being municipal corporations, it will be observed, are expressly excepted from the terms of the prohibition. Section 16 of art. 1 is the provision relating to the power of eminent domain, and prohibits the taking or damaging of private property for public use until compensation is made to the owner therefor, or the amount of such compensation is ascertained and paid into court for his use. But this act does not provide for taking or damaging of private property for a public use within the meaning of this section of the constitution. True, it provides for an assessment of property for benefits, but this relegates the act to the provisions relating to taxing power rather than to those relating to the power of eminent domain. Section 9 of art. 7 relates to the power of the corporate authorities of "cities, towns, and villages" to make local improvements by special assessments. It has no application to "counties," and hence any limitation it may place on the powers of the first named municipalities has no application to the second.

Section 5 of art. 11 requires the legislature to provide for the election of county, township, precinct, and district officers, prescribe their duties, fix their term of office, and regulate their compensation in proportion to their duties. The act of 1907 provides that the assessment of benefits authorized to be made by the act shall be made by an ap-

pointive commission, and, if we understand the respondents, it is thought that this commission should have been made elective, and the fact that it was not made so renders the act amenable to the constitutional provision cited. But commissioners appointed by a municipality to make an assessment of benefits are in no sense officers of such municipality. While, generally speaking, an officer is one employed on behalf of the government, in a strict legal sense it means an employment on behalf of the government in some fixed and permanent capacity, not in a capacity merely transient, occasional or incidental. Those engaged in mere transient or occasional employments on behalf of the municipality are more properly employees than officers, and it was not the purpose of this section of the constitution to require that mere employees should be elected. Section 12 of art. 11 declares that the legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes. The act in question here is not within any of the provisions of this section. The state is not intending or purporting to impose a tax upon any county, city or town for county, city or town purposes. It has merely provided a method by which the county may levy on itself a special assessment for benefits accruing from a public improvement, in part payment of the cost of the improvement; the law itself imposes no such tax. We conclude, therefore, that the act is not void for any of the constitutional reasons suggested, and that the decree of the trial court cannot be justified on the theory of the invalidity of the act.

The act of 1909 is also said to be unconstitutional, but we feel that we are not warranted to inquire into this question at the instance of the respondents, as it in no manner

affects any right of theirs, other than such as belongs to them in common with the public at large as citizens and taxpayers of the state. The act creates a special fund and appropriates money therefrom "to be expended in the construction or improvement of what is known as the Lake Washington Canal," but it is not the source of authority under which the persons constructing the canal are acting. Their power and authority is derived from other legislation which we hold to be valid, hence, this act does not so far form a part of the general scheme as to require the cessation of the work if it be unconstitutional. Neither can the respondents, in virtue of their rights as taxpayers, inquire into the constitutionality of the act. Courts of equity will not inquire into the action of state officers accused of misappropriating public funds on the complaint of a citizen and taxpayer, as the attorney general of the state is the proper person to institute suits where there has been a wrongful disposition of the public revenue. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37; *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186.

The appellants contend that no right of recovery exists for damages to shore lands bordering on a navigable waterway by changes in the surface level or in the course of the current thereof, when such changes are made by the general government in the improvement of the navigability of such waterway. And they argue in the case at bar with great force that these respondents have no cause of complaint because the change here contemplated is in the interest of public navigation. But we prefer to rest the case on the reasons heretofore given, and mention this question for the purpose of saying that we express no opinion upon it, but leave it for consideration when it arises in a case involving it directly.

The judgment of the trial court is reversed, and the cause remanded with instructions to enter a judgment to

the effect that the respondents, plaintiffs below, take nothing by their action, and that the appellants recover their costs.

DUNBAR, C. J., CHADWICK, GOSE, MOUNT, MORRIS, and CROW, JJ., concur.

PARKER, J. (concurring)—I concur upon the grounds assigned by Judge Fullerton in disposing of respondents' first principal contention. I desire, however, to refrain from becoming committed to the view that the special assessment act of 1909 is constitutional. It seems to me that, since we conclude that respondents' property is not being taken, it is immaterial to their rights in this cause that reliance for raising some of the funds is placed upon this act. I think the power to raise revenue by *special assessment* for a purpose of this nature becomes, in the light of the uniform taxation restrictions and other provisions of the constitution, a question of such serious moment that it should not be determined here upon the very limited argument presented and the lack of necessity for such decision. I concur in the result.

ELLIS, J., took no part.

[No. 9343. Department One. June 8, 1911.]

ALFRED WEBER *et al.*, *Respondents*, v. ADELBERT J. WHIDDEN *et al.*, *Appellants*.[1]

TRUSTS—JOINT PURCHASE—TITLE—IN ONE NAME—EQUITY. Where plaintiffs and defendants jointly purchased forty acres of land, the deed being taken in the name of the defendants, and plaintiffs paid for seven acres, set off and agreed upon, the defendants hold the title thereto in trust, and equity will decree a conveyance to plaintiffs; and the rule that the statute of frauds prevents specific performance of oral contracts to convey land does not apply.

SAME—MORTGAGE BY TRUSTEE—EFFECT. The fact that both parties paid but one-half the purchase price, and defendant gave back a

[1]Reported in 115 Pac. 1046.

mortgage for the balance, does not affect plaintiffs' equitable title, except as an incumbrance to be satisfied by payment of their proportion of the mortgage.

Appeal from a judgment of the superior court for King county, Webster, J., entered July 2, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

H. E. Foster, for appellants.

Daniel Landon, for respondents.

PARKER, J.—The plaintiffs, claiming to be the equitable owners of a certain seven-acre tract of land in King county, brought this action to compel conveyance thereof to them from the defendants. A trial resulted in a decree in favor of the plaintiffs, from which the defendants have appealed.

The facts found by the trial court are, in substance, as follows: On about November 2, 1907, the respondents and appellants purchased from one Quartman a forty-acre tract of land in King county at an agreed price of $2,200. It was then agreed between respondents and appellants that respondents should have seven acres of the land and that appellants should have the remainder; that each should pay towards the purchase price in that proportion; that the title should be taken in the name of appellant Adelbert J. Whidden, and upon payment of the entire purchase price, which was to be paid, $1,100 cash, and $1,100 on November 2, 1909, appellants should convey to respondents the seven acres. On November 2, 1907, respondents paid to appellant Adelbert J. Whidden $192, being one-half the purchase price of the seven acres, and thereupon he paid to Quartman $1,100, the first half of the purchase price of the entire forty acres, received a deed therefor, and with his wife executed a mortgage on the land to secure the balance of $1,100 on the purchase price payable November 2, 1909, with 7%

interest, it being understood that respondents would pay their proportion thereof at the same time and then receive their conveyance from appellants. Soon thereafter the boundary lines of the seven acres respondents were to have were agreed upon by the parties, and with the knowledge and consent of appellants, respondents entered upon and took possession thereof and made improvements thereon. They also paid their proportion of the first year's interest on the $1,100 mortgage. On November 8, 1909, appellants paid the second half of the purchase price and interest evidenced by the $1,100 mortgage, which was then released by Quartman. On February 9, 1910, respondents tendered to appellants $220 to reimburse them for their payment of the portion of the mortgage and interest thereon chargeable to respondents, which sum was sufficient for that purpose. Respondents then demanded a deed for the seven acres. This tender and demand was refused, and respondents have deposited the $220 in court for the use of appellants.

The principal contention of counsel for appellants seems to be that the decree was erroneously rendered, because the evidence shows that respondents are attempting to enforce specific performance of an oral contract to sell and convey the seven-acre tract of land, and that the acts of part performance shown are not sufficient to avoid the effect of the statute of frauds. The trial court, it is apparent from the record, did not decide the cause upon the theory that there was a contract of sale between respondents and appellants, but upon the theory that appellants took title to the seven acres in trust for respondents when the land was purchased from Quartman. The main question then is one of fact touching the nature of the original agreement between the parties. A careful review of the evidence convinces us that it supports the findings of the trial court to the effect that the original purchase was for the joint use of the parties in the proportionate shares stated, and that respondents actually furnished their proportionate share of the first

payment upon the purchase price, and agreed to furnish the balance when due. This being true, it seems clear that appellant acquired the title in trust for respondents to the extent of their interest in the land as agreed upon. *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Mayer v. Jacob*, 61 Wash. 291, 112 Pac. 361; 2 Pomeroy, Equity Jurisprudence (3d ed.), 1037.

There is no question made as to the respondents being entitled to the seven acres here involved, if they are entitled to any of the forty acres. The evidence tending to show possession of and improvements made on the land by respondents seems to have been introduced for the purpose of showing the particular seven acres that respondents were entitled to. Since we agree with the trial court that this is not a question of specific performance, we need not notice the sufficiency of this evidence to show part performance of an oral contract. We are of the opinion that the circumstances under which the forty acres was originally purchased gave respondents an equitable title to the seven acres here involved, and that they are entitled to a deed therefor from appellants as decreed. The fact that appellants paid the entire sum due upon the mortgage, of course gave them a claim against respondents, and no doubt would in equity result in denial of relief to respondents until they reimbursed appellants. This claim was in a sense an incumbrance upon respondents' equitable title, but it did not destroy it. Their equitable title became fixed by the original agreement and contribution to the purchase price. The decree is affirmed.

DUNBAR, C. J., GOSE, MOUNT, and FULLERTON, JJ., concur.

[No. 9415. Department One. June 8, 1911.]

D. M. MORGAN *et al.*, *Appellants*, v. BANKERS TRUST COMPANY, *Respondent*.[1]

APPEAL—REVIEW—INSTRUCTIONS—RECORD—NECESSITY OF EVIDENCE. Error in instructions to the jury cannot be reviewed on appeal in the absence of the evidence or any statement of facts on appeal from which it can be ascertained that the instructions were prejudicial to the appellant under the testimony produced and the verdict rendered.

APPEAL — REVIEW — HARMLESS ERROR — PRESUMPTIONS. The presumption of prejudice from error in instructions on the issues presented by the pleadings is overcome by the presumption in favor of the judgment, where the evidence on which the verdict was based is not brought up on appeal.

GOSE, J. dissenting.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 29, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by a passenger in an elevator. Affirmed.[2]

Hayden & Langhorne, for appellants.

Kerr & McCord and *Hudson & Holt* (*Charles Arnold*, of counsel), for respondent.

PARKER, J.—This action was commenced by the plaintiffs to recover damages for personal injuries, which they allege resulted to the plaintiff Annie E. Morgan from the negligence of the defendant in the operation of the elevator in its building in Tacoma while she was a passenger thereon. Issue being joined by the pleadings as to the defendant's negligence, a trial was had, resulting in a verdict and judgment in favor of the defendant. The plaintiffs moved for a new trial, which was overruled, and thereupon appealed from the judgment and the order overruling the motion.

[1]Reported in 115 Pac. 1047.

[2]Rehearing pending.

Appellants ask us to review certain instructions given by the court to the jury. They have not brought here by bill of exceptions or statement of facts any of the evidence introduced upon the trial. The instructions, being in writing and signed by the judge, were filed in the case and are brought here in the clerk's transcript. It is contended by counsel for respondent that we cannot review the questions presented upon the alleged error in the giving of these instructions, because the evidence not being before us it cannot be said that any prejudicial error resulted to appellants. The question then for our solution is, can it be determined from this record that the giving of these instructions was so prejudicial to appellants' rights as to call for a reversal of the judgment and the granting of a new trial. In other words, must we presume that the verdict and judgment were erroneously rendered, and the motion for new trial erroneously overruled, solely because of the giving of these instructions, assuming, for the sake of argument, that they do not state the law applicable to the issues in the case.

It seems to us that, in the absence of the evidence upon which the verdict and judgment were rendered, we are unable to say that such disposition of the cause was erroneous. It may be that the evidence was such that respondent was entitled to a verdict and judgment in its favor as a matter of law, and that the court would upon that ground have sustained a motion made by respondent for judgment in its favor notwithstanding the verdict, had the verdict been against it. Hence, the final disposition of the case may have been correct however erroneous the instructions may be which are here sought to be reviewed. The question of whether or not instructions brought before the court upon appeal, accompanied only by a record such as we have here, can be reviewed does not appear to have heretofore been presented to this court. We think, however, that there have been some decisions by this court and the territorial court which, by

analogy, support the view that such error will not result in the reversal of the decision of the trial court upon such a record as we have here.

In the early case of *Brown v. Forest*, 1 Wash. Ter. 201, the court said:

"Every plaintiff in error brings up for trial the *decision* of the court below, and assumes the burden of showing that it was erroneous. In his precipe he is required to state the charges he makes against it. The precipe herein is not very clear in its assignment, but we shall consider it as charging error in the giving of the instruction which is set out in the bill of exceptions. On the rectitude of that instruction we are under no obligation to decide; because the plaintiff in error has not shown that he was prejudiced thereby, even if it were wrong. All the instructions given in a case are to be taken together, for one may so modify another that what seems wrong, if taken alone, may, considered with the rest, constitute the correct law of the case; so that he who would have the law of his case reviewed must bring here all of it, or need bring none. This plaintiff in error has not done this, and so we cannot say whether the rulings in his case were law or not. His bill of exceptions produces some law that was given, but does not state that such was *all* that was given; even if that produced was incorrect, we would not therefore contravene the presumption which goes in favor of the rectitude of the decision below, but would rather presume, in the absence of a showing to the contrary, that further instructions were given which corrected that stated in the bill."

See, also, *Thompson v. Territory*, 1 Wash. Ter. 547; *Oregon R. & Nav. Co. v. Galliher*, 2 Wash. Ter. 70, 3 Pac. 615.

If the appellate court will indulge the presumption that other instructions may have been given than the ones claimed to be erroneous, rendering the giving of them at most harmless error, when such instructions are brought before it by a record which does not affirmatively show that they were all that were given, upon the same principle, we should here presume that the final disposition of this case was correct, notwithstanding the erroneous instructions brought before us,

since it is easy to see that if the evidence was here it might show that the judgment was in any event a proper one. The disposition of the motion for a new trial was the last act of the court. It then had before it for review the entire case upon which it is presumed to have disposed of that motion, and while the court may have then considered that its instructions to the jury were erroneous, it may also have rightly based its disposition of the motion upon the theory that the judgment was in any event the one that respondent was entitled to as a matter of law under the evidence. It may be suggested that the case of *Payne v. Spokane St. R. Co.*, 15 Wash. 522, 46 Pac. 1054, is not in harmony with this view, since there the court reviewed an instruction when it was claimed that all of the instructions had not been brought up in the record. It will be noticed, however, that there was a statement of facts in that case, and at that time instructions had to be brought to the appellate court by bill of exceptions or statement of facts. It seems to us that the court in that decision simply presumed that the statement of facts contained all of the facts occurring in the cause which could throw any light upon the question of the correctness and prejudicial effect of the instruction there reviewed. The above quotation from *Brown v. Forest, supra,* may possibly seem somewhat broader in its meaning than we would now regard as strictly correct, in view of the decisions in *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605, where it was held that it was not necessary to bring up a record of all evidence and proceedings in the cause in order to review every possible error occurring therein, but that any error might be reviewed by bringing up a record of all of the evidence and proceedings material to a full consideration of the error sought to be reviewed and its possible prejudicial effect. In any event it is necessary to have the record before us affirmatively show in some manner that it contains all of the matters occurring in the cause material to the question sought to

be reviewed. This view is supported in principle by *Carpenter v. Barry*, 26 Wash. 255, 66 Pac. 393, where the court said:

"The appellants assign as error the action of the court in rendering judgment in excess of the verdict. Inasmuch, however, as they have not brought up with their appeal either a statement of facts or bill of exceptions showing the circumstances under which the judgment was rendered, it is manifest that this question is not here for review. It is not error in every instance and under all circumstances for a court to enter a judgment in excess of a verdict; hence, before the appellate court can say it is error so to do in any particular case, sufficient facts must be shown to make it appear that the action of the court is unwarranted in that particular case. Error is never presumed. The record must show it affirmatively."

This court has recognized and followed the familiar rule that a verdict and judgment to which the successful party is entitled as a matter of law under the evidence will not be reversed because of erroneous instructions given to the jury. In *Davis v. Gilliam*, 14 Wash. 206, 44 Pac. 119, the court said:

"It is a familiar rule that a good verdict cures all errors and irregularities in the proceedings, and that errors growing out of a charge are always to be disregarded when 'the verdict is so plainly in accordance with the evidence that it follows as a mere conclusion of law thereon.' Thompson, Trials, § 2403."

See, also, *Secor v. Oregon Imp. Co.*, 15 Wash. 35, 45 Pac. 654; *Kellogg v. Cook*, 18 Wash. 516, 52 Pac. 233.

We have not overlooked the presumption of prejudice which generally follows an erroneous ruling by the trial court. This, however, is only a presumption resting alone upon the ruling itself, and may be overcome by something else occurring in the cause. In *Collett v. Northern Pac. R. Co.*, 23 Wash. 600, 63 Pac. 225, it is said:

"The litigant has a right to have his case tried in a legal manner, and his legal rights protected by the court, and,

when a legal right is invaded or denied by the court, the rule which has often been announced by this court, and which we think is universal, is to the effect that, error having been committed, it will be presumed to be prejudicial error, unless it affirmatively appears from the record that it was not prejudicial."

In *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206, the court observed:

"An appellate court will not be justified in reversing a judgment where an error has been committed if it further appears from the whole record that such error is immaterial, or, in other words, if the record, as a whole, overcomes the presumption of prejudice which is established by the commission of error, and shows affirmatively that no substantial rights of the appellant have been injuriously affected."

We are led to conclude that, in the absence of the evidence upon which the verdict and judgment were rendered, the presumptions in support of the judgment overcome the presumption of prejudice arising from erroneous instructions in this case, assuming for argument's sake only, that the instructions complained of do not correctly state the law.

The judgment is affirmed.

Dunbar, C. J., Mount, and Fullerton, JJ., concur.

Gose, J. (dissenting)—I think the instructions in this case are clearly erroneous. Introductory to the seventh instruction, the court said:

"In the operation of elevators in buildings such as that owned by the defendant Bankers Trust Company, the defendant has the right to assume that individuals using such passenger elevators and transacting business in such buildings are individuals in the usual and accustomed bodily health and strength."

A part of the tenth instruction is in the following language:

"The defendant cannot be convicted of negligence in stopping so suddenly that a jar or recoil may or may not occur,

nor can the defendant be convicted of any negligence in stopping an elevator in its building so suddenly and with such a jar as would not adversely affect the health of a person in a normal condition of health and strength. Accordingly, if you find from the evidence in this case that had a person in a normal condition of health and strength been in said elevator with said operator at the time plaintiff alleges she was injured, and if such person in a normal condition of health and strength would not have in any manner been hurt or injured by the manner in which it was stopped, then your verdict in this case should be for the defendant, even though you believe that the plaintiff might have received a shock that resulted in injury to her by and through the manner in which the elevator was handled by said operator, provided, any condition of bodily infirmity of the plaintiff was unknown to the operator of the elevator."

We excerpt from the respondent's brief the following pertinent language:

"Judging from the pleadings and the suggestions contained in the instructions, the case is one where a neurasthenic woman went into an elevator for the purpose of being transported, and while being so transported for her accommodation and to enable her to leave the elevator at a certain floor, the operator of the elevator stopped it suddenly and caused a recoil of several inches, which produced a slight jar which she claimed caused permanent and serious injuries."

The applicable principle of law is stated in 6 Cyc. 598, as follows:

"The general rule as to the duty to care for the safety of its passengers is applicable in case of passengers who are suffering from some infirmity or disability. And certainly this is true, even if the servants of the carrier have no knowledge or reason to believe that the passenger is laboring under a disability. But the servants are presumed to know that persons in feeble health may be passengers, and if such persons are injured by negligence in operating the train, they are entitled to recover, even though the injury would not have happened to a person in sound health."

The instructions quoted are, in effect, that if the elevator was negligently operated, the respondent having no knowledge of the appellant's infirmities, there could be no recovery unless the negligence was such as would have resulted in injury to a person in sound health. This is not the law. A common carrier of passengers is bound to know that the aged and infirm may be passengers, and if they are injured through its negligence, it is liable in damages for the injury sustained. This being true, I cannot agree with the conclusion reached by the majority. In order to affirm the judgment, we must presume that the plaintiff's evidence did not make a *prima facie* case of negligence. The record before us negatives that presumption. We must assume, I think, as do counsel for the respondent in their brief, that evidence was presented to the jury that called forth the instructions. I think that it must be presumed from the record that the instructions were based upon the evidence, and that, in denying a motion for a new trial, the court adhered to the view of the law which it had theretofore announced to the jury. In other instructions the court had correctly stated that the law holds a common carrier of passengers to the "highest practicable degree of care; the utmost care and diligence consistent with reason and practicability." I think the instructions as an entirety fail to correctly state the law, and that they are misleading.

I therefore dissent.

[No. 9512. Department One. June 8, 1911.]

GRACE M. GOULD, *Respondent*, v. CLARENCE HILL GOULD, *Appellant*.[1]

DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY. A husband is guilty of cruelty warranting a divorce, where it appears that he had community property of the value of $10,000 to $12,000 upon which he could have borrowed funds, that when their first child was born, he placed his wife in a hospital as a charity patient, and on her parents removing her to a private hospital, he made no effort to see her for five weeks, no explanation of his conduct was made, and there was also want of proper support.

Appeal from a judgment of the superior court for King county, Yakey, J., entered December 5, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court, in an action for divorce. Affirmed.

Oliver C. McGilvra, for appellant.

Byers & Byers, for respondent.

PARKER, J.—This is an action for divorce. A decree was rendered in favor of the plaintiff. The defendant has appealed.

The contentions of the appellant involve only the sufficiency of the facts shown to entitle respondent to a divorce. The controlling facts appear in the evidence without any serious dispute, and are, in substance, as follows: Respondent and appellant were married in April, 1908. They have community property of the approximate value of $10,000 to $12,000. This consists of a mortgage upon land in King county. It seems to be in such condition as not to be readily available as cash, but it appears that appellant could easily have borrowed thereon sufficient funds to supply all reasonably present needs of his family.

Some five weeks prior to the commencement of this action, when their first child was about to be born, appellant took

[1]Reported in 115 Pac. 1041.

respondent and placed her as a charity patient in the Wayside Hospital in Seattle, where she was assigned to a bed in a room with others. He called to see her the next day, and also the next day, when he found she had left the hospital. Her mother having ascertained that she was there, removed her to a private hospital, where her child was born soon thereafter. On the day following his last call at the Wayside Hospital, appellant went to her father's office and made inquiry about her, when her father informed him that she had been taken to a private hospital, and assured him that she would be well taken care of. It does not appear that respondent was informed as to her exact whereabouts, neither does it appear that he made inquiry as to where she then was. His inquiry was principally as to who had removed her from the Wayside Hospital. From that time until five weeks thereafter, and after this action had been commenced, he made no further inquiry about her, nor did he make any effort to see her. This conduct on his part is without explanation, except that it might be inferred from his evidence that he was angry because her parents had caused her removal from the Wayside Hospital. This neglect and conduct on part of appellant constitutes the principal act of cruelty relied upon by respondent to secure her divorce. The evidence also tends to show want of proper support of respondent by appellant in view of his means and their station in life. We would hardly be inclined to regard the evidence of nonsupport as sufficient within itself to support the decree, but it seems to us that his conduct and treatment of respondent at this critical period, together with his failure to better provide for her at that time, is sufficient to support the decree upon the ground of cruel treatment. We conclude that the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9562. Department One. June 8, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES L. TENNEY, *Appellant*.[1]

APPEAL—REVIEW—ORDER REFUSING TO VACATE JUDGMENT—ERRORS IN FINAL JUDGMENT. Upon appeal from an order refusing to vacate a judgment of commitment to the insane ward of the penitentiary, errors leading up to the final judgment of commitment cannot be reviewed.

SAME—ERRORS REVIEWABLE—JURISDICTION. Want of jurisdiction to enter a judgment of commitment to the insane ward of the penitentiary, because of the unconstitutionality of the statute, is error reviewable on appeal from the judgment, and hence cannot be raised on appeal from an order refusing to vacate the judgment.

APPEAL—NOTICE—AMENDMENT. A notice of appeal from an order refusing to vacate a judgment cannot be amended so as to make it a notice of appeal from the judgment.

Appeal from an order of the superior court for King county, Main, J., entered March 15, 1911, denying the vacation of a judgment committing the defendant to the insane ward of the state penitentiary. Dismissed.

Thomas R. Horner and *Alfred Gfeller*, for appellant.

John F. Murphy, *Alfred H. Lundin*, and *Herbert B. Butler*, for respondent.

PARKER, J.—The defendant being charged with the crime of assault in the first degree, pleaded not guilty, and in addition thereto, that he was insane or mentally irresponsible at the time of the commission of the crime charged against him, and that since then he has recovered his sanity and is now mentally responsible. This plea was made in substantial compliance with Rem. & Bal. Code, § 2174. The issues being thus made, the case proceeded to trial before the court and a jury, resulting in a verdict rendered on January 5, 1911, finding the defendant not guilty by reason of insanity

[1]Reported in 115 Pac. 1080.

or mental irresponsibility, and also finding: "That the insanity or mental irresponsibility does not exist at the present time; but that the defendant is liable to a relapse of the insane condition so as to be an unsafe person to be at large." On January 21, 1911, the trial court rendered its judgment upon the verdict, committing the defendant as a criminally insane person to the insane ward of the penitentiary. The verdict and judgment were rendered under Laws of 1907, chapter 30, p. 33; Rem. & Bal. Code, §§ 2174, 2175, 2176, 5977. On February 7, 1911, the defendant moved to vacate the judgment committing him as a criminally insane person, alleging errors in the proceedings leading up to and including the rendition of the judgment, and also that the court was without jurisdiction to render such judgment because of the unconstitutionality of the statute under which it was rendered. On February 11, 1911, this motion was heard by the court, and an order entered denying it. On March 17, 1911, the defendant served upon the prosecuting attorney and filed in the case a notice of appeal as follows:

"Comes now James L. Tenney, the defendant in the above entitled cause, by his attorneys Thomas R. Horner and Alfred Gfeller, and gives notice that he appeals from the order denying his motion to vacate the judgment of this court committing him to the insane ward of the penitentiary at Walla Walla, which order was made and entered upon the record herein on the 11th day of February, 1911, to the supreme court of the state of Washington."

It seems too clear to admit of argument to the contrary that this is not an appeal from the final judgment rendered upon the verdict; but is an attempted appeal from the order denying the motion to vacate the judgment. This court has held, in harmony with the rule elsewhere, that such an order is not appealable for the purpose of reviewing errors committed by the trial court affecting the correctness of the judgment sought to be vacated.

In *Sound Investment Co. v. Fairhaven Land Co.*, 45 Wash.

262, 88 Pac. 198, this question was critically examined in the light of the court's previous decisions, where at page 263, the court said:

"It has been the uniform ruling of this court that a motion to vacate a judgment does not affect a substantial right, if the errors complained of are errors of law occurring at the trial; that such errors cannot be reviewed in a motion to vacate, and that, therefore, no substantial right could be invaded by a denial of the motion."

To permit an appeal from such an order would in effect enable a losing party to extend the statutory time for taking an appeal to review errors occurring in the cause in which the judgment is rendered.

Counsel for appellant insist that since their motion to vacate the judgment is based upon want of jurisdiction of the trial court because of the unconstitutionality of the statute authorizing such a judgment, there is something more involved in their appeal than a question of error in the rendition of the judgment. We are not able to agree with this contention. In the case of *In re Newcomb*, 56 Wash. 395, 105 Pac. 1042, we held that the existence of the law under which the trial court rendered judgment was a question for the trial court to determine in the case, and that its decision upon that question could only be reviewed by appeal, since it involved nothing but a question of whether or not such decision was erroneous. That was a habeas corpus case; but as in this case, it was an attempt to review alleged errors in a cause leading up to and including the rendering of the final judgment therein otherwise than by an appeal from such judgment. We are not able to see that the question of the constitutionality of this law affects the question here involved any differently than would the question of the existence of the law.

Counsel for appellant ask that they be permitted to amend their notice of appeal so as to have it refer to the judgment instead of to the later order, in the event we conclude it is

not sufficient to bring here for review the questions raised by them. Under what circumstances a notice of appeal may be amended we need not now determine. This notice of appeal is not in any degree uncertain as to the order appealed from. It not only describes the order with absolute certainty, but with equal certainty gives it date. The notice is not defective as to form or substance. It is unavailing because it is clearly not an appeal from the judgment rendered in the action where the alleged errors were committed. To amend it as asked would make an entirely different notice. We are compelled to dismiss the appeal. It is so ordered.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9453 Department One. June 8, 1911.]

JOHN O. COOPER, *Respondent*, v. R. J. FISHER *et al.*, *Appellants*.[1]

SALES—MINING STOCK—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY. A husband having purchased mining stock for the benefit of himself and wife, they cannot claim that the sale was induced by false representations as to the value and title of the company's "mines," where it appears that he was an officer of the corporation, knew that the title was held by another in trust, had employed a practical mining man to make a report on the property, and claims to have relied upon a prospectus of the company which showed that the "mines" were only undeveloped mining prospects which were at that time in good faith believed to be valuable.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 19, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Hastings & Stedman, for appellants.

Byers & Byers, for respondent.

[1]Reported in 115 Pac. 1041.

Gose, J.—This suit was brought to recover the balance due upon the following written instrument executed by the defendant husband in favor of the plaintiff:

"Seattle, Wash., Aug. 20, 1907.

"Received from R. J. Fisher, the sum of five hundred (500) dollars to account of purchase price of one hundred thousand (100,000) shares of stock of the British Yukon Copper & Silver Mining Company at the price of five (5) cents per share, the balance of purchase price to be paid on or before two years from date. It is understood that the above one hundred thousand shares of stock is part of the original stock issued by the above described corporation to John O. Cooper, and the balance of the purchase price is to be paid to John O. Cooper.

"(Signed) John O. Cooper,
"R. J. Fisher."

There was a judgment for the plaintiff. The defendants have appealed.

The appellants admit the execution of the instrument set forth, and seek to defeat its enforcement on the ground that it was obtained by means of fraud. The answer alleges affirmatively that the respondent represented that the British Yukon Copper & Silver Mining Company, a Washington corporation, was the owner of, and had title to, three valuable mines, situated in the Atlin mining district, in the province of British Columbia; that large mineral deposits had been discovered therein; that the appellants in executing the writing relied upon such representations; that the representations were false; that the corporation did not own or have title to the mines; that they were not valuable; "and that said shares of stock were not then, and at no time have been, of any value whatsoever, and that there was no consideration moving to the defendant for the making of said agreement."

The court found that the mining claims were held in the name of the respondent in trust for the corporation; that the appellant husband, at the time of the sale and at all times thereafter, knew of that fact; that they were so held on ac-

count of the expense incident to a transfer to the Washington corporation; that the appellant husband acquiesced in such holding; that he was elected as president and trustee of the corporation about a month before he purchased the stock; that he accepted such offices and continued to exercise the duties thereof until September 30, 1908, when he presented his resignation to the board of trustees; that during his official service, he had free access to the books and records of the corporation; that shortly after purchasing the stock, he employed a practical mining man to examine and report upon the property; that he made a favorable report as to its value, by letter dated August 29, 1907; that on October 24, 1907, the appellant addressed a letter to him, requesting him to make an adverse report on the property, and stating that "the reason that I am writing this is that we have been trying to buy some stock back, and word has come from Atlin that every one is talking about the fine property we have there, and it has been impossible, even after securing an option on stock, to purchase the same;" that the expert, in compliance with the request, on the 10th day of November, 1907, made an unfavorable report on the mine; that during the official service of the appellant, the capital stock was on the market with his knowledge; that he advised the purchase of the stock; that the contract was made for the benefit of the community; and that the respondent made the sale in good faith.

These findings are fully supported by the evidence. The appellants paid $500 on the purchase price of the stock at the time the contract was signed, $200 on September 24, and $200 on February 26, 1908. The stock was issued to the appellant husband on August 1, 1907, six days before the formal contract was signed, and was retained by him until the close of the trial, when he tendered it in court. He testified that, in purchasing the stock, he relied upon the information contained in the prospectus which the corporation had issued. For a document of its nature it is singularly modest. It refers to the property as "three claims," desig-

nating them by name. It further states that the assessment work has been done, and that the "mining claims" are ready "to be crown granted;" that the company desires "to continue the development of this property;" that "the development work on the group consists of open cuts and shallow shafts at various places. The most extensive of these is a shaft forty feet deep on the Dundee claim." It also sets forth in detail the accessibility of the claims to water transportation, the cost of shipping, and the cost of smelting the ore. These facts are not denied.

It is apparent from the record that the appellants knew that they were purchasing stock in a mining prospect. The prospect was considered good by all the parties, and they in good faith believed that it would, when developed, be a valuable property. Bills of sale for the claims had been executed, and were held by the secretary of the corporation at the time the appellants purchased the stock. The case of *Archibald v. Hahn*, 53 Wash. 602, 102 Pac. 636, relied upon by the appellants, has no application to the facts in the case at bar. In that case it was evident that the vendor knowingly sold worthless stock by fraudulently representing it to be valuable.

During the progress of the trial it developed that the respondent had conveyed his interest in the claims to a British Columbia corporation. He testified, however, that he had reserved fifty-one per cent of the stock for the benefit of the stockholders of the old corporation when they "got together and arranged this, but that has never been done." Both corporations, the old and the new, were capitalized for the same amount—$1,000,000. Counsel for the appellants, in response to a remark of the court at the close of the trial that the contract could not be rescinded without an offer to return the stock, stated: "We will tender it back in open court. The reason why it has not been tendered is because the corporation went into the hands of a receiver and became defunct, and it is hardly worth its price as waste paper." The

assets of the corporation had been sold at a receiver's sale in this state before the conveyance of the claims to the British Columbia corporation. In their answer and throughout the trial, as we have seen, the appellants contended that the stock was without value. Their contention was probably true at the time of the trial. In view of that fact, they have not been injured by the conveyance to the foreign corporation. However, so far as the record discloses, they can exchange their stock for a like amount of stock in the foreign corporation.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9445. Department One. June 8, 1911.]

HARRIET E. BALLARD, *Respondent*, v. C. R. COLLINS *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS — NEGLIGENCE—VIOLATION OF STATUTE—COLLISION OF AUTOMOBILE. The driving of an automobile on a dark night, on the left-hand side of a city street at a crossing, without having sufficient lights, in violation of the state law and city ordinances, is gross negligence.

SAME. The driving of an insufficiently lighted automobile at night, on the left-hand side of a narrow street, in violation of law, in order to avoid a street car that was discharging passengers on the right-hand street car track, is not justified as an act in a sudden emergency, where there was not room for two automobiles to pass and the driver might have waited for the street car to proceed.

SAME — CONTRIBUTORY NEGLIGENCE. Contributory negligence by the driver of an automobile which collided with another, is not shown, where he was on the right side of the street, with lawful lights, sounded his horn at the turn, and there was evidence that he was going only two or three miles an hour, while the other car was violating the law as to lights, signals, and the side of the street upon which it could lawfully travel.

[1]Reported in 115 Pac. 1050.

TRIAL—FINDINGS—DAMAGES—ISSUES AND PROOF. A finding of six hundred dollars damages to person and property by an automobile collision, without segregation of the items, is within the issues and proof, where the pleadings claimed $500 for personal injuries, and over $220 damages to the car, and $700 damages in the salable value thereof; and there was evidence that the cost of repairing the car was $220, that its market value was reduced $500 after the repairs had been made, and the plaintiff was thrown against the car with great force, and bruised and confined to her bed for three weeks.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 27, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages through a collision between automobiles. Affirmed.

H. R. Clise and *C. K. Poe*, for appellants.

Trefethen & Grinstead, for respondent.

GOSE, J.—This suit was brought to recover damages for personal injuries sustained by the plaintiff, and for injuries to her automobile, in consequence of a collision between her automobile and the automobile of the defendants. The two cars collided at about the line of intersection of First avenue north and Harrison street, and near the north side of the latter street, in the city of Seattle. The plaintiff's car had been traveling north on First avenue north, and as it turned west into Harrison street, the collision occurred. The defendants' car was traveling east on Harrison street, on the north or left-hand side thereof, at the time of the collision. First avenue north runs north and south, and Harrison street runs east and west. The case was tried to the court, terminating in a judgment for the plaintiff. The defendants have appealed.

At the time of the collision, the respondent's car was entering Harrison street on the right-hand side, and the appellants' car was passing out of Harrison street, traveling upon the left-hand side of the street. The collision happened in the evening, after dark, upon a dark night. The respond-

ent's car had its gas head lights and its oil lights lighted, and the appellants' car had its oil lights lighted, but not its gas head lights. The respondent's chauffeur testified that he sounded his horn as he turned into Harrison street. The driver of the appellants' car admits that he gave no signal or warning of his approach. Section 5558, Rem. & Bal. Code, provides that drivers of vehicles shall seasonably turn their vehicles to the right of the center of the road, when meeting another vehicle on a public highway. Section 5569 provides that every automobile shall be provided with a bell or horn, which shall be rung or blown whenever there is danger of collision or accident, and that:

"The driver or operator of every automobile or motor vehicle shall turn to the right in meeting vehicles, teams and persons moving or headed in an opposite direction, and turn to the right in passing vehicles, teams and persons moving or headed in the same direction."

Section 54 of Ordinance No. 16,081 of the city of Seattle provides:

"It shall be unlawful for any person, while driving any horse or other animal attached to any vehicle, or driving or propelling any automobile over, along or through any paved, planked or macadamized street, to occupy other than the right side of any such street, except within the block in which is the point of destination."

Section 62 provides:

"It shall be unlawful for any person to ride, drive or propel any automobile, auto cycle or other motor vehicle, without having attached thereto a bell, gong, horn or whistle, in good working order, and sufficient to give warning of the approach of such machine or vehicle, or to fail or neglect to sound such device as a warning, when necessary, upon approaching any street car, carriage, automobile, auto cycle or other vehicle, horse or other animal, or pedestrian, or upon approaching any place where any person or persons may be entering or leaving any street car, or other public conveyance, or upon approaching any street intersection or before passing around any corner."

The ordinance further provides:

"It shall be unlawful for any person to ride, drive or propel any automobile, or other motor vehicle, between the hours of sunset and sunrise, unless there shall be fastened to the front thereof at least two (2) white lights of sufficient candle power to enable the person driving or operating such vehicle to clearly see ahead a distance of at least two hundred (200) feet. . . . "

Harrison street was paved at the time of the accident, and the point where the appellants' car crossed to the north of the street was not within the block of its destination. The court found, in substance, that, at the time of the accident, the respondent's car was proceeding on the right-hand side of the street at a rate of speed not exceeding four miles an hour; that it displayed two white lights, of sufficient brilliancy and candle power to enable its driver to clearly see ahead a distance of over two hundred feet; that its driver was handling it in a prudent and careful manner; that the appellants' machine was proceeding on the left-hand side of the street without such white lights, and that the "collision was caused entirely and solely by reason of the negligence, carelessness, want of attention, and safe driving of the defendants' " driver.

It is clear from the facts stated that the driver of the appellants' car was guilty of gross negligence. He was driving on the wrong side of the street, in defiance of both the statute and the ordinance of the city. Nor did he display the head lights, or sound his horn, as required by law. In *Engelking v. Seattle Elec. Co.*, 50 Wash. 196, 96 Pac. 1039, speaking of an ordinance of the city of Seattle which limits the rate of speed of street cars in the business or settled residential districts to twelve miles an hour, the court said:

"We prefer to adhere to the doctrine that a thing which is done in violation of positive law is in itself negligence."

This rule is followed in *Wilson v. Puget Sound Elec. R.*, 52 Wash. 522, 101 Pac. 50, 132 Am. St. 1044. The same

view was announced in *Irwin v. Judge*, 81 Conn. 492, 71 Atl. 572, and *Fenn v. Clark*, 11 Cal. App. 79, 103 Pac. 944. The appellants have cited *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. 346. That case arose out of a collision between a street car and a wagon drawn by a team of horses. The court said in that case that the law of the road, as applied to free vehicles, is founded on good reasons, and that its observance tends to prevent carelessness, but that it has no application to cars running on fixed tracks. The appellants have also cited *Brooks v. Hart*, 14 N. H. 307; *Daniels v. Clegg*, 28 Mich. 32, and *Brember v. Jones*, 67 N. H. 374, 30 Atl. 411, 26 L. R. A. 408. As we read these cases, they are in harmony with the view of this court. In the *Brooks* case it is said:

"Ordinarily, if one traveler in meeting another be found upon the half of the way appointed to him by the statute, traveling with ordinary care and prudence, and he sustain an injury by a collision with the vehicle of another, who is upon that part of the way to which he has not the statutory right, the individual who has thus sustained the injury may have redress by action against him who was thus on the part of the way to which the statute did not give him the right. The traveler who thus travels prudently and carefully upon the half of the way assigned to him, will ordinarily pass at the hazard and risk of him who trenches upon his rights, in the manner already stated."

The appellants' car, while traveling east on Harrison street, was following an inbound street car which stopped at First avenue north. At that time their machine was a few feet behind the street car. Passengers were getting on and off at the right-hand side of the car, and instead of waiting for the car to proceed, the driver of the appellants' machine, to avoid the passengers of the street car, turned to the left with a view to taking the left-hand or north car track. When he had driven his machine onto that track, he heard a street car coming north on First avenue. Believing that he did not have time to either pass between the two street cars or

reverse and get behind the inbound car, he passed onto the north or left-hand side of the street. At that point the distance from the north street car track to the curbing is about eight feet. Upon these facts, the appellants invoke the rule that, where one acts suddenly under stress of circumstances, his acts are not voluntary, and argue that, to avoid the outbound car, they were justified in putting their machine on the left-hand side of the street. The vice of the argument is that the proximate cause of the accident was the act of the appellants' driver in turning to the left of the inbound car, instead of waiting for it to pass on. He testified that he was not pressed for time. He knew that the street was narrow, and that there was not room for two machines to pass in the street on the north side of the north car track. It was dark, and it would seem that, under the conditions that surrounded him, common prudence would have dictated that he should not place his machine north of the south car track.

It is insisted that the respondent's driver was guilty of contributory negligence. We have seen that he had the right of way; that he displayed his lights and sounded his horn; and that the driver of the appellants' car neither displayed his lights nor gave warning of his approach. It is argued, however, that he was proceeding at a high rate of speed. The evidence as to the speed the respective cars were traveling is in direct conflict. The respondent's car had followed a northbound car on First avenue north for some two or three blocks, and had slowed down at the intersection of the streets, to permit passengers to alight from the outbound car, when the collision occurred. The respondent's driver testified that the speed of his car did not then exceed two or three miles an hour. Other witnesses confirmed his statement. From a careful reading of the evidence, we feel constrained to adopt the view of the trial court. It is supported, not only by abundant direct evidence, but by the circumstances of the case. While the respondent's chauffeur

was required to exercise reasonable care, he was not required to anticipate that a car was approaching him on his side of the street. He had a right to presume that the law of the road would be observed.

The court found:

"(4) That by reason of said collision caused as aforesaid, the plaintiff herein was violently thrown against the side of her automobile aforesaid, causing injury to her limbs and causing her physical pain and suffering.

"(5) That by reason of such carelessness, negligence, want of attention and safe driving of the defendants' automobile, and by reason of the acts of the defendants and their duly authorized agent aforesaid, the plaintiff has been damaged in the sum of six hundred ($600) dollars."

It is contended that the damages awarded are not within either the issues or the evidence. The complaint alleges that the respondent was violently thrown against the side of her automobile, causing an injury to her limbs, and causing physical pain and suffering, to her damage in the sum of $500. It further alleges:

"That by reason of said careless and negligent act of the defendants' automobile driver as aforesaid the damages were sustained to plaintiff's automobile to the extent of two hundred twenty-two and 46-100 dollars ($222.46), as shown more specifically in Exhibit A hereto attached and made a part hereof; that in addition thereto the salable value of said car was reduced to an extent of seven hundred dollars ($700); that also the plaintiff was deprived of the use of said car for the space of time of eleven days at a reasonable value of twenty dollars ($20) per day, or a total of two hundred twenty dollars ($220); the total damages to said car as stated in this paragraph amounting to the sum of eleven hundred forty-two and 46-100 dollars ($1142.46)."

The respondent was not permitted to introduce evidence as to the loss of the use of the car, it not appearing that it was used for hire or that the respondent hired another vehicle to take its place. The evidence is undisputed that the respondent paid $220 for repairing the car. There is evidence that

the market value of the car, after the repairs had been made, was diminished by the collision to the extent of from $500 to $1,000. The respondent, who is sixty-four years of age, was thrown against the side of her car with such force that her elbow and knee were bruised and she was confined to her bed and room for three weeks. We think that the amount awarded is within the issues and the evidence. The court was not required to segregate the damages.

Some criticism is made of the form of the findings, but we think they are without merit. The judgment is affirmed.

DUNBAR, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9361. Department One. June 9, 1911.]

CHARLES R. OTEY, *Appellant*, v. E. H. BRADLEY, *Respondent*.[1]

PARENT AND CHILD—INJURIES—MALPRACTICE—ACTION BY PARENT—LOSS OF SERVICES—EXPENSE. A parent may maintain an action for malpractice in treating his minor son, whereby he incurred expense for treatment and suffered loss of services.

PLEADING—COMPLAINT—DEMURRER. A complaint stating any cause of action is not demurrable for want of sufficient facts because it attempts to state another cause of action which plaintiff is not entitled to maintain.

PARENT AND CHILD—INJURIES—ACTIONS—JOINDER—PARTIES. There is no defect of parties plaintiff or misjoinder of causes, in an action brought for malpractice in the treatment of plaintiff's minor son without joining the son, where the plaintiff states but one good cause of action in his favor for expenses incurred and loss of service, although other allegations show that the son also has a cause of action, he being a stranger to the suit.

Appeal from a judgment of the superior court for King county, Gay, J., entered October 11, 1910, dismissing an

[1]Reported in 115 Pac. 1045.

action for malpractice, upon sustaining a demurrer to the complaint. Reversed.

Blaine, Tucker & Hyland, and *Robert C. Saunders*, for appellant.

Bo Sweeney, for respondent.

PARKER, J.—This appeal involves the correctness of the rulings of the trial court in sustaining the defendant's demurrer to the plaintiff's complaint and dismissing the action upon his election not to amend. The complaint is as follows:

"Plaintiff complains of defendant and alleges:

"(1) That Oliver S. Otey, age five is his minor son.

"(2) That on or about the second day of Sept., 1909, said Oliver S. Otey by accident broke or fractured his arm.

"(3) That plaintiff then employed defendant, who is a physician and surgeon, as such surgeon, for reasonable reward to be paid therefor, to set, treat and heal the same.

"(4) That defendant so negligently and unskillfully conducted himself in attempting to set, treat and heal the said arm that permanent deformity of the forearm and hand, a partial paralysis of the ulna and radial nerve, a permanent stiffening and enlargement of the wrist, a permanent stiffening of the fingers in a bent position, a permanent paralysis and atrophy of the nerves feeding the flexing muscles and tendons of the wrist and fingers, and a permanent crippling and uselessness of said forearm and hand ensued.

"That by reason of said negligence and unskillfulness plaintiff's minor son was made sick and plaintiff has been compelled to pay, and has paid, ninety dollars expense for medical treatment and nursing for his said minor son, and will be compelled to pay a large sum to wit five hundred dollars for further medical treatment and nursing in order to partially save the forearm and hand of his said son, who is permanently a cripple, and did pay defendant for his said negligent and unskillful treatment the sum of twenty-five dollars, which was totally lost to this plaintiff, and has lost the services of his said minor son until he shall come of age, and will be put to great expense, cost and trouble to rear and bring up said minor son in his said crippled condition, which he would not otherwise have incurred, and that his said

minor son has suffered, and will continue to suffer throughout the period of his natural life, great bodily and mental pain and distress and great humiliation, shame, discomfort, inconvenience and disadvantage because of his said permanently deformed and crippled condition, and will have his earning capacity greatly impaired and limited thereby throughout all of natural life after he shall become of age, all to the damage of the plaintiff and his minor son in the sum of fifteen thousand dollars ($15,000).

"Wherefore plaintiff demands judgment against defendant for the sum of fifteen thousand dollars ($15,000) together with his costs and disbursements herein."

The grounds of demurrer are as follows:

"(1) That there is a defect of parties plaintiff.

"(2) That several causes of action have been improperly united.

"(3) That the complaint does not state facts sufficient to constitute a cause of action against this defendant."

That the complaint states a cause of action in favor of appellant, in so far as it alleges expense for treatment of the son and loss of his services, seems quite clear. *Harris v. Puget Sound Elec. R. Co.*, 52 Wash. 298, 299, 100 Pac. 841. And the fact that other allegations of the complaint may show an attempt on the part of respondent to recover upon a cause of action which he is not entitled to maintain, does not render his complaint defective as against a demurrer upon the ground of no cause of action. *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562. As to this ground, therefore, the demurrer is not sustainable.

It is contended by counsel for respondent that the demurrer was properly sustained under our holding in *Johnson v. Seattle Elec. Co.*, 39 Wash. 211, 81 Pac. 705. If the son had joined as plaintiff in this action, there would be some basis for such contention, under that decision, for then there would have been an attempt by two different parties to sue jointly upon their separate claims, as in that case. We have no concern here with any cause of action the son may have against respondent, since the son is a stranger to this action.

If the allegations show that the son has a cause of action against respondent, it is a cause upon which appellant cannot recover. We are unable to discover in the allegations of the complaint more than one good cause of action in appellant's favor. He is entitled to maintain this cause without joining any one with him as plaintiff, hence, there is not a defect of parties nor a misjoinder of causes. *Times Publishing Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. 865.

The judgment is reversed, with directions to overrule the demurrer.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9473. Department One. June 9, 1911.]

EMMA C. KNEFF, *Respondent*, v. W. B. SANFORD, *Appellant*.[1]

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. Whether a chauffeur was acting within the scope of his authority, so as to render his employer liable for an accident, is a question of fact for the jury, where it appears that the automobile was kept standing for hire in front of a hotel, that the chauffeur took a telephone girl home from her work at the hotel, without collecting any fare, which the owner had permitted on at least one other occasion, that the chauffeur injured a pedestrian on his return trip, and that the chauffeur was not discharged; and it is not sufficient to overcome the *prima facie* case, as a matter of law, although he and the owner testified that he acted contrary to instructions in taking the girl home without collecting a fare.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered October 18, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

[1]Reported in 115 Pac. 1040.

Phelps & Selden, for appellant.

Ray & Dennis, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, claimed by the plaintiff to have resulted to her from the negligent operation of an automobile belonging to the defendant while it was in charge of one Boldman as plaintiff's chauffeur. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff. The defendant has appealed.

The negligence upon which the verdict and judgment rest is that of Boldman, the chauffeur, and it is insisted by counsel for appellant that the question as to whether or not the agent was acting within the scope of his employment was, under the evidence, a question of law calling for a directed verdict in appellant's favor. This is the only question presented for our consideration.

Appellant is the owner of several passenger automobiles which he operates for hire. These are kept standing in front of the Tacoma Hotel, at Tacoma, when not actually engaged in carrying passengers, with a view to securing passengers from the hotel or through orders received at the hotel by telephone message. On October 30, 1909, and for some ten days prior thereto, Boldman was employed by appellant as one of his chauffeurs in charge of one of these machines. Boldman's hours to be on duty were from noon until midnight. He was paid by a commission on the amount of fares earned by the machine he was in charge of. About 6 o'clock in the evening of October 30, 1909, and while he was on duty, a Miss Johnson, one of the telephone girls at the hotel, came out of the hotel, evidently on her way home from work. Boldman then asked her if she did not want to ride home, to which she replied she did, and thereupon he took her in his machine to her home. It was upon returning to the hotel from Miss Johnson's home on this trip, Boldman being alone in the machine, that respondent was injured. When Miss

Johnson was taken into the automobile, nothing was said about her fare, and no fare was ever collected from her or charged to her. The regular fare for the trip would have been about $1.50. Appellant learned of the trip and the accident soon thereafter. He kept Boldman in his employ about ten months thereafter, and says: "He would be in my employ yet, only he quit. I did not discharge him. He quit himself." These facts appear by the record and are not disputed. It seems to us that these facts, standing alone, are clearly sufficient to support the verdict and judgment, unless we must hold, as a matter of law, that the evidence offered by appellant overcame the *prima facie* case thus made against him.

In *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329, we said:

"In cases of this kind, where it is shown that the wagon and team doing damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the wagon and team were in possession of the owner, and that whoever was driving it was doing so for the owner."

See authorities there cited.

The only evidence tending to overcome this presumption that Boldman was acting within the scope of his employment at the time of the accident is the testimony of the appellant and Boldman. It is, in substance, that appellant had instructed his chauffeurs, including Boldman, not to take the telephone girls home in the automobiles unless instructed so to do by appellant, or upon payment of their fares, and that Boldman was not instructed to take Miss Johnson home on this occasion. Appellant admitted that he had caused two of the telephone girls to be taken from the hotel on their way home, on at least one other occasion. This evidence, coming from appellant and Boldman, both of whom were interested witnesses, we think did not call for an instructed verdict in favor of appellant. The question presented, in its last analysis, is one of fact, and therefore cannot be determined by us in appellant's favor as a matter of law. *Gosline v. Dry-*

foos, 45 Wash. 396, 88 Pac. 634; *Johnson v. Great Northern Lumber Co.*, 48 Wash. 325, 93 Pac. 516; *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *Gibson v. Chicago, Milwaukee & Puget Sound R. Co.*, 61 Wash. 639, 112 Pac. 919; *Sonnentheil v. Moerlein Brewing Co.*, 172 U. S. 401.

It is true that Boldman is not interested in the case as a party, but his friendly business relations with appellant we think were such as to bring him within the rule which requires us to leave to the jury the question of the weight to be given his testimony, because of such interest. Moore, Facts, § 90.

The principal reliance of counsel for appellant seems to be upon the cases of *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216, and *Slater v. Advance Threshing Co.*, 97 Minn. 305, 107 N. W. 133. These cases, however, we think do not turn upon questions of fact. The facts there involved seem to be without dispute. We are of the opinion that the cause was properly submitted to the jury. The judgment is affirmed.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9450. Department One. June 9, 1911.]

ALBERT ROSENBAUM *et al.*, *Respondents*, v. THOMAS EVANS *et al.*, *Appellants*.[1]

REFORMATION OF INSTRUMENTS—COMPLAINT — SUFFICIENCY — MUTUAL MISTAKE. A complaint for the reformation of a deed sufficiently shows a "mutual" mistake, where it alleges a mistake either of the scrivener or of the plaintiffs, whereby the southeast quarter was conveyed, when the grantors and grantees both intended the southwest quarter.

VENUE—TRANSITORY ACTION — REFORMATION OF DEED — COURTS—JURISDICTION. An action to reform a deed is transitory, the courts of this state having jurisdiction over the person of the defendant, although the deed was of land in another state.

[1]Reported in 115 Pac. 1054.

Reformation of Instruments—Defenses—Estoppel. Failure to read a deed does not estop the grantors from maintaining an action to reform it to correct a mistake in the description.

Reformation of Instruments — Mutual Mistake — Evidence—Sufficiency. A mutual mistake, warranting the reformation of a deed, is established, within the rule requiring clear and convincing evidence, where the deed called for the southeast quarter, and was not read by the grantors, who intended to convey the southwest quarter, and it appears that the agreement was for an unimproved quarter, that the southeast quarter was improved and worth twice as much as the southwest quarter, that the grantors had declined to convey the northeast quarter, which was of less value than the southeast, and testified that they had given the grantees the choice of the two west quarters, which were of equal value and unimproved, the grantees admitting that they were to have unimproved land, but testifying that they were given the choice of the two south quarters, and that they were surprised to find improvements on the land described in the deed.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 6, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to reform a deed. Affirmed.

Geo. D. Emery (*W. D. Covington*, of counsel), for appellants.

H. A. P. Myers and *Walter L. Johnstone*, for respondents.

Gose, J.—This is an action to reform a deed. There was a decree for the plaintiffs. The defendants have appealed.

In the month of April, 1910, the respondents were the owners of section 9 and the southeast quarter of section 11, in township 132, north, of range 103, west of the Fifth Principal Meridian, in Bowman county, in the state of North Dakota. At the same time the appellants owned a tract of unplatted land outside the limits of the city of Seattle, in King county, containing about two and one-half acres. On the 4th day of April, 1910, the respondents executed and delivered to appellants a deed embracing the southeast quarter of section 9 and forty acres in section 11 of the land situated

in North Dakota. In exchange for this conveyance, the appellants executed and delivered to the respondents a deed to the unplatted land. The respondents paid to the appellants $207, and assumed a mortgage upon the unplatted land of $1,500, principal, and $97, interest, the agreed difference in value between the properties exchanged. The respondents contend that there was a mutual mistake in their deed to appellants, whereby they conveyed to them the *southeast* quarter of section 9 instead of the *southwest* quarter. The allegation in the complaint is:

"That by mistake either of the scrivener who wrote the deed, or of the plaintiffs, the deed of the plaintiffs which was delivered to defendants about April 1st, 1910, described the land in said section nine (9), as the southeast quarter (SE¼), when in truth and in fact it should have described it as the southwest quarter (SW¼) of said section nine (9), as the same was intended by both grantors and grantees therein, and the defendants received said deed without calling attention to said mistake."

The appellants demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action.

The first objection urged against the sufficiency of the complaint is that there is no allegation that the mistake was mutual. While the word "mutual" is not used, the substance of the allegation is that the respondents intended to convey, and the appellants intended to receive, the southwest quarter of section 9, instead of the southeast quarter as described in the deed. This, we think, is a sufficient allegation of a mutual mistake.

It is next insisted that the action is one affecting the title to real property, and that the court was without jurisdiction. This contention, we think, is also without merit. All the parties were residents of King county at the time of the commencement and trial of the case. In *Wood v. Mastick*, 2 Wash. Ter. 64, 3 Pac. 612, and *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614, this court held that a

suit for the specific performance of a contract to convey real estate is a transitory one. In discussing the precise question in the *Morgan* case, the court said that a decree of specific performance affects the parties to the action personally, but does not determine the title in the sense the word is used in our statute. In *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607, 133 Am. St. 1030, we held that an action to establish and enforce a trust in real property operates upon the party personally, and is transitory in its nature. A like view is announced in *Sheppard v. Coeur d'Alene Lum. Co.*, 62 Wash. 12, 112 Pac. 932. In *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117, it was sought to have a deed to certain property in the state of Pennsylvania declared void and to have a reconveyance. To the plea of jurisdiction, the court said:

"It is well settled, however, that a court of equity has power to compel a reconveyance of property outside of its jurisdiction, by reason of its control over the parties before it."

In *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, the action was commenced in Cook county to set aside a conveyance of real estate on the ground of fraud, and for specific performance of a contract to convey land in Lake county. It was held that jurisdiction of the parties invests the court with power to proceed to final decree, in all that class of cases where it is sought to compel "the execution and cancellation" of deeds to land. It was said that, when the relief sought does not require the court to deal directly with "the estate itself," the proceeding does not affect real estate within the meaning of the statute. The same view is announced in: *Johnston v. Wadsworth*, 24 Ore. 494, 34 Pac. 13; *Johnson v. Gibson*, 116 Ill. 294, 6 N. E. 205; *Massie v. Watts*, 6 Cranch, 148, 159; *Gilliland v. Inabnit*, 92 Iowa 46, 60 N. W. 211; *Pillow v. King*, 55 Ark. 633, 18 S. W. 764; *Frank v. Peyton*, 82 Ky. 150; *Brown v. Desmond*, 100 Mass. 267; *Lehmberg v. Biberstein*, 51 Tex. 457; *McQuerry v.*

Gilliland, 89 Ky. 434, 12 S. W. 1037, 7 L. R. A. (N. S.) 454.

In *Pillow v. King*, the court said:

"In the case of *Massie v. Watts*, 6 Cranch, 160, Chief Justice Marshall says: 'In a case of fraud, or trust, or of contract, the jurisdiction of the court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.' And in a very recent case Chief Justice Fuller said: 'The real estate was situated in Tennessee, and governed by the law of its *situs;* and while, by means of its power over the person of a party, a court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not act directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or canceled by or on behalf of the party.' *Carpenter v. Strange*, 141 U. S. 105."

In *Frank v. Peyton* the action was commenced in Kentucky, where all the parties resided, to compel the vendor of real estate situated in Illinois to execute a deed acknowledged according to the laws of the latter state. The vendor had theretofore executed a deed with a defective acknowledgment. The lower court sustained a demurrer to the jurisdiction. In treating the question on appeal, it was held that the proceeding acts upon the person, "and the fact that property in another jurisdiction may be affected by it is no objection to the relief." The appellants have referred to *Seymour v. LaFurgey*, 47 Wash. 450, 92 Pac. 267, in support of their contention. That was an action to terminate a contract for the purchase and removal of standing timber. The court held that logging contracts of that character affect the title to land upon which the timber is growing, inasmuch as they contemplate that the purchaser shall take possession of the land and use it while cutting and removing the timber. *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76, also cited by the appellants, has no application to the facts in this case.

It is urged that, in the absence of fraud, one who signs a

written instrument, without reading it or acquainting himself with its contents, is estopped by his own negligence from maintaining a suit for its reformation. The respondents both testified that they did not read the deed before signing. We do not think the authorities cited by appellants to sustain this contention are applicable to the facts before us. They, no doubt, announce the correct rule as applied to certain kinds of contracts. We cannot think that the mere failure of either party to a deed to read it operates as a bar to an action for its reformation, based upon error in the description. Mistakes in the description of real property, where it is described by government subdivisions, are easily made. The respondents in good faith believed that they furnished the scrivener with the correct description, and relied upon him to write it in the deed. The rule contended for would be harsh and inequitable if applied here. The rules governing cases of equitable cognizance must be applied with more or less flexibility as the equities of the particular case warrant. *Lewis v. Wellard*, 62 Wash. 590, 114 Pac. 455.

To warrant a decree of reformation of a written instrument, there must be clear and convincing evidence of a mutual mistake. *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734; *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914. The appellants insist that, if there was a mistake in the instant case, it was a mistake on the part of the respondents only, and that the evidence does not warrant the decree. The decree has abundant support in the record. The essential facts shown are that the respondents, prior to the execution of the deed in controversy, had made a tentative arrangement with the appellants for the exchange of the northeast quarter of section 9 and the forty acres in section 11, for their property. The respondents discovered that a road took a strip off appellants' property to the extent of about one-fourth of an acre, and declined to consummate the deal. A little later the respondents offered the appellants the forty-acre tract in section 11 and their choice of the west quarters of section 9 for their

property, paying the difference as heretofore stated. One Mulvihill, a real estate agent, acted as an intermediary between the parties. The respondents gave him a sectional map with the west quarters plainly marked in pencil, which he exhibited to the appellant husband and then returned to the respondents. The plat is in the record. The appellant husband denies that he saw the plat, but Mulvihill says he showed it to him. The respondents testified that the appellant, after seeing the plat, selected the southwest quarter of section 9. The appellant says that he was offered the choice of the two south quarters, and that he selected the one described in the deed.

The court found, and the evidence shows, that the southwest quarter of section 9 is worth $1,600, and that the southeast quarter is worth $3,200. The west quarters were of equal value. The southeast quarter is more valuable than the northeast quarter, which the respondents declined to exchange after discovering the shortage in the appellant's property. The southeast quarter was improved in crop and had a granary upon it. The appellant admits that he did not expect to get improved property, but that he was to have prairie land. The west quarters are unbroken prairie. The stenographer, who made a copy of the abstract of title to section 9 at the request of the respondents, wrote upon the caption and the cover the words: "Abstract of Title to the Southwest Quarter of Section 9." She testified as the appellants' witness that, when the respondents and the appellants came for the abstract, she called the appellants' attention to the indorsement on the cover, and that "they both looked at it." This occurred three or four days after the delivery of the deed. It is patent that the respondents did not offer the appellants the choice of the two south quarters when one was double the value of the other; and moreover, as we have seen, the offer embraced the choice of two unimproved quarters. The appellant husband knew, when he found the quarter improved and in crop, that the deed invested him

with the legal title to property which was not rightfully his. He testified that he was "very much surprised" in finding it fenced.

It is urged that the record discloses such a discrepancy in the value of the King county property and the property embraced in the decree as to make the decree oppressive. The trial court refused to make any finding as to the value of the King county property, although requested to do so. The parties had the right to exchange properties if they desired, and we will not make a new contract for them. Giving to the findings of the trial court the weight they deserve, they are supported by the record.

The decree is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

[No. 9435. Department One. June 9, 1911.]

ALFRED BLODGETT, *Respondent*, v. OTIS INGLIS *et al.*, *Appellants*.[1]

ASSIGNMENT FOR CREDITORS—DISCHARGE—PARTNER OF DEBTOR—LIABILITY FOR DEFICIENCY. Where creditors agree to accept an assignment in full payment of their claims, they cannot subsequently recover the deficiency from an associate of their debtor on the claim that there was a silent partnership between them; since the discharge of one partner discharges all.

SAME—REPRESENTATIONS—EFFECT. An agreement by creditors to discharge their debtor in consideration of an assignment for creditors operates to discharge the debtor's partner, notwithstanding representations made to the creditors that it would not have that effect, where the partner was not responsible for the representations.

Appeal from a judgment of the superior court for King county, Gay, J., entered October 25, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

[1]Reported in 115 Pac. 1043.

Wm. Parmerlee, for appellants.

Will H. Thompson, for respondent.

MOUNT, J.—The plaintiff brought this action to recover a balance alleged to be due upon three causes of action for goods sold and delivered. The first cause of action was for goods sold and delivered by the plaintiff. The other two were based upon assigned claims of the same character. The defendant Siegel made no defense. The other two defendants denied liability. Upon the trial of the case to the court and a jury, it was conceded the goods were sold and delivered to defendant Siegel. The main question in the case was, whether the defendant Siegel and the defendants Otis Inglis and Frank Inglis were copartners at the time the goods were sold, or afterwards became partners, so that they became liable for the claim sued upon. At the close of the plaintiff's evidence, and at the close of all the evidence, the court declined to direct a verdict in favor of the defendants Inglis Brothers. The jury found a general verdict in favor of the plaintiff for the full amount claimed. The defendants Inglis Brothers have appealed from that judgment.

It appears that, in the years 1906-7, the defendant Siegel was engaged in the business of logging. He had purchased timber from Inglis Brothers at an agreed price per thousand feet. In the year 1907, Mr. Siegel was largely in debt to various creditors. In that year he suffered a stroke of paralysis, and was unable to carry on his business. Inglis Brothers, who had been loaning him money and were his largest creditors, thereupon took charge of the logs and logging equipment for the purpose of saving as much as possible to his estate. The claims sued upon were mostly furnished prior to this time. Some of them were perhaps furnished after this time, but all were furnished upon the credit of Siegel. The various creditors, thinking that the assets were sufficient to pay all the claims, entered into a contract in writing with Mr. and Mrs. Siegel, as follows:

"This agreement between W. L. Siegel and Addie W. Siegel, his wife, (hereinafter called debtors), P. V. Davis, (hereinafter called trustee), the undersigned, being all the creditors of said Siegel and wife, (hereinafter called creditors), and Tallie Jones, (hereinafter called agent):

"Witnesseth: That whereas the said debtors, on account of the protracted sickness of said W. L. Siegel, and the shrinkage of the value of logs, have become indebted to said creditors for various amounts and said debtors and creditors are mutually desirous of conserving all the assets of said debtors, connected with their business of logging heretofore conducted by them, for the use and benefit of all the creditors of said debtors in proportion to their respective claims, and of avoiding the delays, inconvenience and expenses of court proceedings for the enforcement or collection of said claims of said creditors, and whereas all the parties hereto have agreed that all of the assets of said business of logging be assigned and transferred to said trustee, for the use and benefit of said creditors and said creditors have agreed, that Jones shall act as their agent, representative and attorney in fact, for the purpose of carrying out this agreement:

"Now, therefore, the said debtors in consideration of the premises and the covenants herein contained, do hereby, sell, assign, transfer and convey to the said P. V. Davis, all the timber, contracts for timber, logs, booms, chains, tools, implements, notes, accounts and other property of every kind and description, connected with or constituting a part of the logging business of the said debtors, heretofore conducted and carried on by them, near Auburn, King county, Washington, including a certain donkey engine with lines, blocks, and tackle connected therewith, together with the logging camp and all buildings and other property constituting a part thereof, but in trust nevertheless, for the use, benefit and security of said creditors, and upon and for the further trust, uses and purposes hereinafter declared, that is to say:

"(1) That said trustee shall use every reasonable effort to convert all said assets into cash, as soon as shall appear to be for the best interest of all concerned, and shall sell all or any portion of said property at the best price obtainable.

"(2) That said trustee will not sell any portion of said property, without the consent of said agent, and all cash received by said trustee shall be deposited in the Puget Sound

National Bank of Seattle in the joint names of said trustee and said agent and all checks drawn upon said funds shall be signed by said trustee and countersigned by said agent.

"(3) That out of the funds realized from said assets, the said trustee shall be paid the sum of $250 for his services as such trustee, and in full settlement of his claim against said debtors as their attorney in relation to said logging business, and after the payment of all other necessary, proper and lawful expenses incurred in connection with the protection, collection and sale of said assets, all of which shall be approved by said agent, the balance of said funds shall be paid to said creditors *pro rata* in proportion to their just and lawful claims, and the surplus, if any, then remaining in the hands of said trustee shall be paid to said debtors.

"(4) That said creditors, and each of them, hereby agree to accept the net proceeds realized by said trustee from the conversion of said assets into cash, in full payment of their, and each of their claims, and to *pro rate* the same as hereinbefore specified, but in the event of said cash thus realized, being more than sufficient to pay all said claims and expenses, the balance is to be paid to said debtors as hereinbefore provided.

"And it is specifically agreed, that in no event whatsoever whether this trust agreement be superseded or substituted by receivership or bankruptcy proceedings or other court proceedings or not, shall said creditors, or any of them, claim or receive any personal judgment against said debtors, or either of them, or any other property or assets belonging to said debtors, other than that connected with that of said business of logging, on account of their claims or any part thereof.

"Witness our hands and seals this 22d day of April, 1908."

This contract was signed by all the creditors and by Siegel and wife. The trustee therein named thereafter took charge of the estate, and proceeded to dispose of the same for the benefit of creditors. At the time of the trial, dividends amounting to forty-eight per cent of the claims had been paid to the creditors, and there was still some property to be disposed of. After the contract was entered into and up to the time this action was begun, Inglis Brothers had been

treated as creditors. They had signed the contract as creditors, and filed a claim against the estate for more than $9,600. Some objections were made by certain creditors to the amount of the claim of Inglis Brothers, but it was finally allowed at $9,619, and Inglis Brothers shared in the dividends which were paid. After these dividends were paid, this action was begun by the plaintiff, who was a creditor of Siegel and had notice of everything that was done under the contract.

One of the assigned claims sued upon belonged to the firm of which Tallie Jones, named in the contract, was a member. Mr. Jones, of course, was conversant with all the facts in regard to the connection of Inglis Brothers with Mr. Siegel. There is some evidence in the case that Inglis Brothers and Siegel were partners in certain logging operations, but as we read the record, there was no substantial basis for the claim that Inglis Brothers and Siegel were general partners, or that the claims sued on were for goods furnished upon the credit of such copartnership. These goods appear to have been furnished upon the sole credit of Mr. Siegel, and charged to him. But if we concede, for the purposes of this case, that there was sufficient evidence to go to the jury upon that question, and that Inglis Brothers and Siegel were general copartners, and that the goods were all furnished upon the credit of the copartnership, still the plaintiff cannot recover in this action, because, by the provisions of the contract quoted above, the creditors have satisfied their claims as against Siegel, and therefore have no recourse against the other partners. The contract recites:

"The said creditors and each of them hereby agree to accept the net proceeds realized by said trustee from the conversion of said assets into cash, in full payment of their, and each of their claims, and to *pro rate* the same as hereinbefore specified."

The rule is that a discharge of one partner from all liability on account of a partnership debt is a discharge of all

the partners. *Gray's Ex'rs v. Brown*, 22 Ala. 262; *Rice v. Webster*, 18 Ill. 331; *Bonney v. Bonney*, 29 Iowa 448; *Harbeck v. Pupin*, 145 N. Y. 70, 39 N. E. 722; *Joy v. Wurtz*, Fed. Case, No. 7,555; *Willings v. Consequa*, Fed. Case, No. 17,767; *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534, 1 Am. St. 475. The respondent seeks to avoid this rule by saying that he was informed by Mr. Davis, at the time he signed the contract, that the contract would not release Inglis Brothers, and that the plaintiff was thereby misled. We may assume that Mr. Davis did so inform the plaintiff, but this fact is disputed. It was also conclusively shown that Mr. Davis, at the time this information was given, did not represent the copartnership, if one actually existed, nor did he represent Inglis Brothers, but represented the private interests of Siegel and wife, and so informed the plaintiff and all the creditors. Of course, Inglis Brothers were therefore not bound by such representations, if they were made by Mr. Davis. If the property was partnership property, the plaintiff was aware of that fact at the time he entered into the contract and took the property. He was willing to take it in satisfaction of his claims. The fact that later developments proved that the property was insufficient to pay his claims in full does not justify him in claiming recourse upon other partners. It is clear, therefore, that the lower court should have directed a judgment in favor of the defendants.

The judgment must be reversed, and the cause remanded to be dismissed.

DUNBAR, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9494. Department One. June 9, 1911.]

JOSEPH MILBANK, *Appellant*, v. CHARLES ROWLAND *et al.*, *Respondents*.[1]

ADVERSE POSSESSION—BOUNDARIES — MISTAKE — HOSTILE CLAIM—EVIDENCE—SUFFICIENCY. That frame buildings extended three and one-half inches over onto the adjoining lot of another does not show an adverse claim to the land occupied, where it appears that the exact location of the line was not known when the lot was first acquired, and on replacing part of the buildings along the line, a survey was made and a brick building was erected on that part of the true line, and the agent of the owner agreed to remove the other buildings.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 16, 1911, upon findings in favor of the defendants, in an action for injunctive relief and to quiet title. Affirmed.

Fogg & Fogg, for appellant.

Boyle, Warburton & Brockway, for respondents.

MOUNT, J.—The plaintiff brought this action, claiming to be the owner of a strip of land about three and one-half inches in width across the north side of lot 16 in block 1305, map of New Tacoma, and to restrain the defendants from erecting a building upon this strip. The plaintiff claimed ownership of the strip of land in question by reason of alleged adverse claim for a period of more than ten years. The defendants denied ownership in the plaintiff, and alleged ownership in themselves, and prayed to have their title quieted. On the trial of the case to the court without a jury, the trial court found that the plaintiff had made no adverse claim, and entered a judgment in favor of defendants. Plaintiff has appealed.

It appears from the record, that the plaintiff personally has never seen the land in question; that all his business in

[1]Reported in 115 Pac. 1053.

the city of Tacoma, both in buying and improving the real estate, has been conducted by agents, who have managed and controlled his property; that in the year 1894, through his agents, he purchased lot 15 in block 1305. This lot lies immediately to the north of lot 16 in the same block, lot 16 being owned by the defendants. Both lots extend through from C street to Commerce street. At the time the plaintiff purchased lot 15, some frame buildings were located upon it. These buildings stood over the south line of lot 15, about three and one-half inches on lot 16. The exact location of the lot lines was not known. In the year 1904, the frame building standing on lot 15, and which faced upon Commerce street, was replaced by a brick building, which was erected by the plaintiff's agents. At the time this brick building was constructed, the true line was surveyed and located, and the brick building was placed upon the true line. The building extended about one-half the length of the lot.

In 1910, defendants, preparatory to erecting a four-story brick and cement building upon lot 16, caused the line between lots 15 and 16 to be surveyed, and discovered that the frame building facing upon C street extended over onto lot 16 about three and one-half inches. Defendants immediately notified plaintiff's agent of that fact, and requested them to move the frame building off of lot 16. The defendants' evidence is to the effect that the agent of plaintiff promised to do so, but later, after discovering that this would cost about $900, declined to do so, and then for the first time claimed to own the strip by adverse possession. The plaintiff's agent denied that he promised to remove the building, but we think the weight of the evidence is to the effect that plaintiff's agent promised to do so, and that no open or other claim of ownership was ever made by the plaintiff to the strip of land prior to that time. This fact, taken in connection with the removal of the frame building facing on Commerce street, and replacing the same by a permanent structure on the true line between the lots, indicates to us that there has never been any

adverse holding of the strip in dispute, but that the plaintiff intended to claim only to the true line. The rule governing this case is stated in *Noyes v. Douglas*, 39 Wash. 314, 81 Pac. 724:

"If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure, but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse."

We are satisfied that the circumstances stated above show that the plaintiff or his agents did not intend to claim more than up to the true line, and therefore, the plaintiff's holding was not adverse. The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9452. Department Two. June 9, 1911.]

OLSON LAND COMPANY, *Respondent*, v. ALKI PARK COMPANY, *Appellant*.[1]

APPEARANCE—PROCESS—DEFECTS—WAIVER — UNLAWFUL DETAINER. A defect in a summons in unlawful detainer, in not requiring the defendant to appear within fifteen days, as required by statute, is waived by a general appearance.

LANDLORD AND TENANT—NOTICE TO QUIT—SUFFICIENCY. A notice to quit for default in the payment of rent is sufficient without a computation of the rent, where it designates the months for which rent is due.

LANDLORD AND TENANT—EVICTION—EMINENT DOMAIN. There is no eviction by a taking of part of the leased premises under the power of eminent domain, as the tenant must seek his damages in the condemnation proceedings; and it is immaterial that the lease provided that in case the premises were condemned the lessee should vacate within thirty days.

[1]Reported in 115 Pac. 1083.

JUDGMENT—RES JUDICATA—EMINENT DOMAIN. A judgment in condemnation proceedings that a tenant was not entitled to compensation because of a stipulation in the lease agreeing to vacate within thirty days if the land was condemned, is conclusive on the tenant, in the absence of an appeal.

LANDLORD AND TENANT—RECOVERY OF POSSESSION—FAILURE TO PAY TAXES—UNLAWFUL DETAINER. The failure of a lessee to pay taxes, as agreed in the lease, entitles the lessor to maintain unlawful detainer.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 23, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for unlawful detainer. Affirmed.

William Martin, for appellant.

Douglas, Lane & Douglas, for respondent.

MORRIS, J.—Appeal from a judgment in an unlawful detainer action. The rights of the parties in and to the premises were fixed by a lease upon tracts M, N, and P, of the plat of Alki Point, covering a period from June 1, 1908, to December 31, 1923. The rental was $130 a month during the year 1908, and $145 a month for the year 1909. In June, 1908, an action was commenced in the district court of the United States for the Western district of Washington, wherein the United States, as petitioner, sought to condemn tract N for the erection and maintenance of a fog signal and light station, and the taking of said tract was thereafter adjudged to be for a public use. The appellant and respondent both appeared in that action, and sought damages for the taking of the tract. On December 1, 1908, judgment was duly entered in the condemnation proceedings, and it was held that the appellant was not entitled to damages, under a provision of the lease reciting that, in case the premises covered by the lease should be acquired by the United States in condemnation proceedings, the appellant would vacate any portion of the premises so acquired within thirty days. From the

entry of the judgment, appellant refused to pay rent, and there was due as rent when this action was commenced $1,725. Under the terms of the lease, appellant obligated itself to pay taxes, but neglected to do so, and permitted the same to become delinquent. Due notice and demand for the payment of the rent and taxes was served upon appellant, and it still refusing, this action was commenced, resulting in judgment against it for the rent due, the restitution of the premises, and forfeiting the lease.

The errors complained of are, (1) that the lower court was without jurisdiction, as the summons was dated November 27 and required the appellant to appear December 13, sixteen days after date; whereas the statute requires the summons in such cases to be made returnable in not less than six nor more than fifteen days. This defect went to the jurisdiction of the person, and as appellant appeared in the action and submitted itself to the jurisdiction of the court, the defect was waived and cured and cannot now be taken advantage of. (2) The notice to quit stated the months for which appellant was in default in the payment of rent, but did not compute the rent due. For this reason the notice is alleged to be insufficient. The designation of the months for which rent was due and unpaid was a sufficient designation of the sum claimed to be due. *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

The other errors alleged may be treated under one head, the contention being that, when part of the leased premises was taken under the condemnation proceedings, it operated as an eviction from the part taken, and the rent abated as to such part, requiring, before an unlawful detainer action could be maintained, a readjustment of the rent and a failure to pay the sum determined in the readjustment. While there are some cases sustaining appellant's position in this regard, the great weight of authority is the other way. The cases sustaining appellant's contention are from Missouri, New York, and Louisiana. The Missouri case, *Barclay v.*

Picker, 38 Mo. 143, is referred to in the note to *Corrigan v. Chicago*, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212, where a contrary rule is announced. There it is said:

"This decision was based on Taylor's Landlord & Tenant, § 519, which says that a lease becomes void on taking the land for public improvements. But the authorities cited are *Mills v. Baehr*, 24 Wend. 254, which decided only that a tenant who had been paid full compensation for injuries to his possession by widening a street could not claim that this was a 'casualty' within a provision of his lease; and *Barker v. Hodgson*, 3 Maule & S. 270, which involved no question as to tenancy or taking by eminent domain, but related to the effect of an infectious disease upon the charter of a ship. It will be thus seen that the cases cited do not support the text."

The Missouri rule is also criticized in 1 Washburne on Real Property (5th ed.), 558, note 4, where it is said the cases relied upon do not support the doctrine. An examination of New York and Louisiana cases would seem to indicate that the rulings in those states, in so far as this contention is upheld, was based upon the particular recitals of statutory provisions. *Gillespie v. Thomas*, 15 Wend. 464; *Foucher v. Choppin*, 17 La. Ann. 321. The doctrine of the Missouri and Louisiana cases is referred to and commented upon adversely in *Stubbings v. Village of Evanston*, 136 Ill. 37, 26 N. E. 577, 29 Am. St. 300, 11 L. R. A. 839, and *Gluck v. Mayor of Baltimore*, 81 Md. 315, 32 Atl. 515, 48 Am. St. 515, in both of which an examination of the authorities leads the court to say that, both upon principle and the decided weight of authority, the correct rule is, that a tenant, when part of the leased premises is taken under the power of eminent domain, cannot claim an eviction by the landlord, nor be released from the payment of rent. The landlord could convey by his lease no greater title than he had, which was at all times subject to the exercise of the right of eminent domain on the part of those upon whom, because of the public necessity and convenience, the statute had conferred the power. Both thus held their interest in the property

subject to the exercise of this sovereign power; the only limitation being that the land could not be taken, nor the estate diminished, without just compensation being ascertained and paid. The tenant cannot, therefore, compel the landlord to accept a lessened rent. The obligation to pay rent, as fixed in the lease, is not terminated by the condemnation proceedings, but remains in full force, irrespective of such proceedings; and if, by virtue of them, the tenant is damaged by injury to his leasehold, he must seek his damage from the one who inflicts it, and have it determined and set apart to him in the condemnation proceedings, the purpose of which, after an adjudication of public use, is to determine and fix the damages to be paid to all those having any interest in the property that will be destroyed or damaged by the taking for public use. *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 Pick. 159; *Foote v. Cincinnati*, 11 Ohio 408, 38 Am. Dec. 737; Washburne, Real Property, *supra*.

Appellant sought to recover this damage in the condemnation proceedings, but was met by its covenant to vacate and surrender, as provided in the lease. Whether that judgment was correct or not, in holding that appellant was not entitled to damages because of such provision in the lease, it was a final judgment, rendered by a court of competent jurisdiction, and as such, fixes and determines appellant's right in the matter. Appellant's failure to pay the taxes was likewise a breach of its leasehold covenant, and the landlord was, because of such breach, entitled to maintain this action and obtain a restitution of the demised premises. The appellant could only retain possession of the premises as it kept and performed its covenants. When it failed and refused to perform, it lost its right of possession, and subjected itself to an action of this character.

Finding no error, the judgment is affirmed.

Chadwick, Crow, Ellis, and Parker, JJ., concur.

[Nos. 9580, 9581. Department Two. June 9, 1911.]

SALLIE WEATHERALL, *Appellant*, v. ROBERT WEATHERALL *et al.*, *Respondents*.[1]

APPEAL—REVIEW—FINDINGS—FACT OF MARRIAGE. Upon an issue as to whether a marriage ceremony was performed between an Indian woman and a white man, findings will not be disturbed on appeal where the evidence was so contradictory that it is difficult to reach a conclusion without a personal view and hearing of the witnesses.

MARRIAGE—EXISTENCE OF RELATION—WANT OF LICENSE—EVIDENCE—SUFFICIENCY. Upon an issue as to the performance of a marriage ceremony, the absence of a license and failure to make any return as required by law are proper facts to be considered, but not conclusive as they do not invalidate a marriage otherwise valid.

SAME—WANT OF AUTHORITY. Lack of authority of one officiating as a minister in a marriage ceremony is admissible upon an issue as to whether the authority was exercised.

MARRIAGE—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. The testimony of an Indian woman that she was married to a white man with whom she had intimate relations is overcome where the preponderance of the evidence is to the effect that no ceremony was performed and that they did not live together as man and wife, the man described himself in many conveyances as a single man; and any presumption from cohabitation is overcome by evidence of the previous bad character of the woman and of similar relations with other men.

WILLS—CAPACITY OF TESTATOR. Incapacity to make a will cannot be established by showing that the testator was frequently under the influence of intoxicants.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 14, 1910, dismissing on the merits actions to establish a marriage and to contest a will, and to establish a resulting trust in real property. Affirmed.

J. W. Robinson and *R. H. Fry* (*McCafferty, Robinson & Godfrey*, of counsel), for appellant.

A. J. Falknor and *Troy & Sturdevant*, for respondents.

[1]Reported in 115 Pac. 1078.

MORRIS, J.—This appeal involves two proceedings, consolidated in the court below and here for the purpose of hearing. In one, appellant sought in an equitable suit to establish a marriage between herself and Harry Weatherall, the testator of respondents, and to have her community interest in the estate fixed and determined; or, failing to establish the marriage, she prayed for a decree establishing a resulting trust in certain of the real estate. In the other, she sought in the probate proceedings to establish the marriage, and contested the will upon the ground of incapacity upon the part of the testator. These two proceedings are now before us for the second time. Upon the first appeal, we reviewed the ruling of the lower court in striking certain evidence by which it was sought to establish the marriage, and in granting respondents' motion to dismiss, and we held (*Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822) these rulings of the lower court to be error, and remanded the cases, directing the lower court to receive the stricken and offered testimony, and to further proceed with the trials. This has been done, and we are now asked to review the final judgment of the lower court, which is adverse to appellant upon all her contentions.

The first appeal presented questions of law only, and having there fully determined the legal phases of the cases, nothing more need be said, further than that we still adhere to the views therein expressed, and proceed to the review of this appeal, which presents questions of fact only, with the law before us as therein determined. This review has been a laborious task, on account of the size of the record. Forty-four witnesses were examined and twenty-four exhibits introduced in evidence. Many errors are assigned upon the admission of evidence, some of which we regard as well taken, and have read the record accordingly. Others we overrule, but on account of the number of them, and the fact that they affect only the testimony submitted and involve no assertion or rejection of any particular rule of evidence, and thus are of

no interest except in the particular instance, we make no further reference to them. Neither do we think an extended review of the evidence would serve any good purpose. The only witnesses to the marriage were two Indians, James Tobin and his wife. The wife is a niece of appellant and, so far as this record goes, her heir, and thus interested in the outcome of the trial. This fact doubtless had its effect upon the court below in weighing their testimony and finally rejecting it. Other witnesses, who testify to declarations of deceased, and by whom it is sought to show the general repute of a marriage and other relevant facts, are shown to have sought to establish an interest in some of the property after the death of Harry Weatherall, and were compelled by the executors to restore such property to the estate. Other witnesses testify that the only talk concerning a marriage between appellant and deceased could be traced to two white men who had married Indian woman, and for that reason sought to place deceased in a like relation with appellant. These facts, if credited, together with the appearance of the various witnesses upon the stand, their manner of giving their testimony, their apparent candor or lack of it, noticeable to the lower court in seeing and hearing them testify, though not to us in reading the record, would be strong factors in determining the weight of their testimony, and the effect to be given it. The testimony as a whole is so contradictory that it is difficult to reach a conclusion without having the benefit of a personal view and hearing of the witnesses.

Illustrating this view, some witnesses testify that appellant and deceased kept their earnings in common, in charge of appellant; that appellant's wages when picking and culling oysters were paid to deceased. While others, and more in number, testify that appellant was always paid by deceased by the sack for picking oysters, and specific instances of such payments are given by a witness who had charge of the accounts. Other testimony is to the effect that appellant was

permitted to charge the account of deceased with purchases. While others, among them a small merchant who had a store in that vicinity and sold them many goods, testify that such was not the case, but that appellant always had a separate account and was never permitted to purchase goods upon the credit of deceased. Others testify that appellant and deceased lived together in a float house as man and wife, and were so regarded in the neighborhood. While others testify that they lived separate and apart, the appellant living alone in the float house and deceased in another small house upon the shore, and that the community never regarded them as husband and wife. By far the preponderance of the evidence is with the respondents on these points.

The marriage is attacked by showing there was no license issued, nor any return made as required by law; and while the absence of license, or the failure to make return would not invalidate a marriage otherwise valid (*In re Hollopeter*, 52 Wash. 41, 100 Pac. 159, 132 Am. St. 952, 21 L. R. A. (N. S.) 847), these are proper facts to consider, in view of the conflicting testimony here shown, as to whether or not there was a ceremony of marriage. The marriage is said to have been performed by Kettle Labatum, an Indian minister. Many witnesses testify he was not a minister, nor regarded or known as such by either the Indians or white people; and while again, as we said in the first appeal, if a ceremony was performed by one who professed to have authority, and the contracting parties believed in that authority, and consummated the marriage under that belief, the marriage is valid, still the lack of authority, when established by the great preponderance of the evidence, is a strong factor in determining it was not exercised.

Much other like conflicting evidence might be referred to. In so far as the business relations of the deceased appear in the record—and he seems to have been a man of affairs, acquiring some little property—it is all consistent with the belief that he was never married. He had many transactions

by way of deed and mortgage, and executed them all as a single man, in many of them describing and referring to himself as a single man. His whole business life, in so far as the silent witnesses in this record show it, is confirmatory of his belief and assertion that he was not a married man. It is undoubted that he had certain intimate relations with appellant, but inasmuch as it also appears that appellant lived with two other white men in the same community prior to her acquaintance with deceased, it may safely be assumed that those intimate relations could be indulged in without the sanctity of the marriage relation, and the unquestioned character of appellant's life prior to her meeting with deceased weakens the presumptions that are ordinarily established, in cases of this character, by cohabitation. The presumption of marriage from cohabitation is indulged in in the interest of decency, and because of the law's regard for virtue as against licentiousness. But when, as here, it is made to appear that the woman is lewd and free with her favors, cohabitation is not of itself very strong evidence of marriage; *In re Brush*, 25 App. Div. 610, 49 N. Y. Supp. 803; *Bell v. Clarke*, 45 Misc. 272, 92 N. Y. Supp. 163; especially when it is sought to be established by evidence of a divided character, and the repute depended upon is not general nor consistent, but only special and conflicting. *Arnold v. Chesebrough*, 58 Fed. 833.

There is no evidence upon which any resulting trust could be established in favor of appellant as to the oyster lands. Nor is there any evidence of the testator's incapacity to make a valid will; the only evidence relied upon in this latter contention being that the testator was a hard drinker and, during the latter years of his life, frequently under the influence of intoxicants. It would take more than this for any court to hold a testator did not have sufficient capacity to make a valid will.

For these reasons, coupled with the uniform rule of this court that the decision of the lower court upon contested

questions of fact alone will not be disturbed when the evidence is ample to sustain it, and there is no manifest error in the findings, we reach the same conclusion upon all the facts in issue as did the court below. Standing alone the evidence of the appellant was sufficient to establish a marriage, but it has been more than overcome and its presumptions destroyed by the strength of the case presented by respondents.

The judgment is affirmed.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9583. Department Two. June 10, 1911.]

MRS. G. A. MORRISON, *Respondent* v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

CARRIERS — STREET RAILWAYS — SETTING DOWN PASSENGERS — INSTRUCTIONS. An instruction relating to the negligence of a street car conductor in starting a car, from which plaintiff had alighted, while her dress was caught on the car is within the pleadings and proof that the car was started while she was attempting to leave it after it had come to a stop.

SAME—CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. In an action for injuries sustained by a passenger on a street car, instructions to find for the plaintiff if the allegations of the complaint are proved, unless her own negligence caused the injury, are not erroneous as ignoring the defense of contributory negligence, where other instructions properly submitted that issue.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 22, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in alighting from a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

Marion A. Butler (*Milo A. Root*, of counsel), for respondent.

[1]Reported in 115 Pac. 1076.

MORRIS, J.—Respondent, a widow, having sustained injuries through the alleged negligence of appellant, recovered judgment for damages, and the company appeals.

The errors assigned are in the instructions to the jury, the first one complained of being this:

"If you should believe from the evidence in this case that the plaintiff while alighting from one of defendant's cars at a place where it had stopped to permit her to alight, had certain of her clothing caught on anything connected with the car, and that the conductor saw, or might have seen by exercising the care I have told you the law requires, that her clothing was thus caught, but that said conductor started said car while said passenger was thus entangled, and that she was injured thereby as alleged in the amended complaint, then I instruct you that such conductor would be guilty of negligence which is chargeable against the company."

No complaint is made of this instruction as not correctly stating a proper rule of law, but it is attacked upon the ground that it presented an issue to the jury not raised by the pleadings nor properly within the issues; and in support of this contention, reference is made to paragraph two of the amended complaint, where it is charged that:

"The plaintiff while attempting to alight from said car, the same having stopped for that purpose, was thrown violently and with great force against the gate or side of the car . . ."

This, it is said, charges negligence after the starting of the car, while the instruction, it is said, refers to the negligent act of the conductor before the car started. Paragraph three of the amended complaint also refers to the manner of the accident, and alleges that the injuries were caused by the negligence of the defendant in starting the car without notice to plaintiff. The negligent act complained of was in starting the car while respondent was in the act of alighting. The evidence of respondent was to the effect that the car was started while she was attempting to leave it, after it had come to a stop. The instruction was, therefore, within both

the pleading and evidence, in referring to the act of the conductor in starting the car while respondent was attempting to alight therefrom. The negligent act referred to in the instruction was not before the car started, but in starting it while respondent was in the act of alighting. The only reference in the instructions to what happened before the car started was the conductor's knowledge of plaintiff's clothing being entangled. This knowledge was not the negligent act referred to in the instruction, but the negligence the court refers to is the starting of the car with such knowledge. We cannot, therefore, see any virtue in this assignment, the instruction being within both the pleading and the proof.

The next instruction complained of was:

"If you find, gentlemen of the jury, that the plaintiff has proved the material allegations alleged in her amended complaint, which are denied by the answer, it will be your duty to find for the plaintiff in this case."

This instruction, it is said, is faulty in that it eliminates the affirmative defense of contributory negligence. If the instruction stood alone and no reference had been made by the court to the contributory negligence of plaintiff, if any, it would be subject to the criticism made, and necessitate a reversal; but we find the court fully covering this defense in telling the jury that:

"Even though you find that the defendant has been guilty of the acts of negligence complained of in the plaintiff's amended complaint, still if the plaintiff at the time of the injury was guilty of some act of negligence on her part which constituted a proximate cause or contributed to a proximate cause of the injury complained of and without which the same would not have happened, then the plaintiff is not entitled to recover. If you find that the plaintiff attempted to alight from the car before it came to a stop (which was the contributory negligence defendant sought to establish) and was injured thereby, she cannot recover."

Another instruction was:

"If you find that the injury complained of may have been either caused by negligence on the part of the plaintiff or by

negligence on the part of the defendant, then the defendant cannot be held liable in this case."

These instructions certainly submitted the alleged contributory negligence to the jury, and it cannot be said it was eliminated because not referred to in the instruction complained of. Very few instructions of a court would pass a critical review if small excerpts are taken, without reference to the context or other matter included in the charge.

The third complaint is addressed to this instruction:

"The material allegations which it is necessary for the defendant to prove, before you can find for it under this affirmative defense, are these: That the injury to the plaintiff, if any, was caused by her own negligent and careless acts, and her own careless acts were the proximate cause of the injury."

This instruction, it is said, wholly ignores the defense of contributory negligence as, to give it effect, the jury must find that the plaintiff's own negligence caused the injury. This instruction, standing alone, would be faulty; but the court in the instruction quoted in treating the previous assignment, told the jury that any negligent act on plaintiff's part which constituted a proximate cause, or contributed to a proximate cause, would defeat recovery; in addition to telling them, what they could more easily comprehend, that if she attempted to leave the car before it came to a stop, she could not recover. Thus, as a whole, the instructions correctly presented defendant's contention to the jury.

Complaint is also made of the court's refusal to give a submitted instruction. We have, however, reviewed this in what we have said concerning the first assignment of error, which embraces the same point.

Finding no reversible error, the judgment is affirmed.

Dunbar, C. J., Chadwick, Ellis, and Crow, JJ., concur.

[No. 9363. *En Banc.* June 10, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Oregon Railroad & Navigation Company, Appellant*, v. CHARLES W. CLAUSEN, *State Auditor, et al., Respondents.*[1]

TAXATION—VALUATION OF RAILWAYS—POWERS OF COMMISSION—SIMILAR STATUTES—REPUGNANT ACTS. Where the value of railway property has been fixed by the state railway commission pursuant to the act of 1907 (Rem. & Bal. Code, § 8638) passed March 8th and approved March 16, 1907, which provides for a determination of the actual value of all railroads by reference to the actual cost of reproduction and that the findings of the railway commission shall be conclusive in any proceeding in which the public and the railroad is interested, the state tax commission has no power to fix another valuation for the purposes of taxation, under the act of 1907 (Rem. & Bal. Code, § 9141) passed February 20th and approved March 6th, which provides that the state tax commission shall determine the annual assessment of the operating property of all railroads by reference to books, papers, market value of the stock, mileage and gross earnings, and personal view, if necessary; in view of both the object to be accomplished by the railway commission act and the fact that it was passed subsequently to the passage of the other act.

SAME—STATUTES—CONSTRUCTION — REPUGNANT ACTS — HARMONIZING ACTS PASSED AT SAME SESSION. The two acts are repugnant, except in so far as the state tax commission may estimate the value until such time as the valuation is fixed by a more certain method by the state railway commission, and this construction should be adopted in order to harmonize two acts passed at the same session; especially in view of the amendatory act of 1911, p. 538, § 117, expressly making the railway commission valuations applicable for the purposes of assessment and taxation.

SAME—STATUTES—LEGISLATIVE CONSTRUCTION. The courts will not speculate upon legislative intent when that body has subsequently put its own construction on prior enactments.

SAME — UNIFORMITY — UNEQUAL TAXATION. Where railway property is assessed upon a higher standard than other railway property and an unequal burden is placed upon it, the company is denied the guaranties of the constitution, and may object although the property was assessed at less than its actual value.

SAME—VALUATION BY TAX COMMISSION—REVIEW — RECORD — PRESUMPTIONS. An arbitrary order of the state tax commission raising

[1]Reported in 116 Pac. 7.

the valuation of railroad property from $19,500,000 to $27,529,771, cannot be sustained on appeal from the order, when the record on appeal does not show the introduction of any evidence or any inquiry by the commission such as is contemplated by Rem. & Bal. Code, § 9141, authorizing the commission to estimate the value; since no presumptions can be indulged on a direct appeal from the finding.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 2, 1910, in favor of the defendants, affirming an order of the state board of equalization in fixing the value of relator's properties for the purpose of taxation. Reversed.

W. W. Cotton, Arthur C. Spencer, and *Ralph E. Moody*, for appellant.

The Attorney General, for respondents.

CHADWICK, J.—The railroad commission law was passed by the legislature at its regular biennial session in 1905. Its primary object was to prevent discrimination and extortion in freight rates, and generally to regulate charges, facilities, and service of railroad companies. Section 12 of the Laws of 1905, page 155, enjoined a duty of ascertaining "the amount of money expended in the construction and equipment per mile of every railway in Washington." At the same session the legislature passed an act creating a state tax commission (Laws 1905, p. 224, chap. 115; Rem. & Bal. Code, § 9084 *et seq.*), and defined its duties and powers. Its work was intended to be supervisory and directory, the legislature evidently intending that its powers should be thereafter more specifically prescribed, for it was made the duty of the tax commission to investigate concerning the revenue systems of other states and countries, and to report its findings to the governor, with recommendations embodied in suitable bills for transmission to the legislature. In 1907 the legislature amended the railroad commission act most materially. [Page 536 *et seq.*] The commission was given

more general inquisitorial powers, with the right to summon witnesses, and to compel the production of books and documents, and to do and require to be done all things to make it an efficient instrument in the working out of the state policy as declared in the title of the original as well as the amendatory act. The bill, as introduced and passed, so changed § 12 of the original act that, instead of a power limited to the ascertainment of the original cost of railroad property, the commission was directed to "ascertain the total market value of the property and all facts proper to be considered in making up a proper and reasonable schedule of freight and passenger rates." The commission was clothed with the full power of the legislature, so far as its rights to investigate might go, and at the same time it was made a *quasi* judicial body, an appeal from its findings to the courts being provided so as to save any constitutional question in that behalf. The commission, after a due season and after notice had been given as in the act provided, instituted a hearing for the purpose of ascertaining the valuation of the railroad properties in this state; and, after a full hearing, found the value of the property of the three principal railway systems to be as follows: Northern Pacific Railway Company, $110,308,450. Great Northern Railway Company, $59,577,212. Oregon Railroad & Navigation Company, $19,500,000.

Section 12 of the railroad commission law (Rem. & Bal. Code, § 8638) provides:

"The findings of the commission, so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission shall be admissible in evidence in any proceeding or hearing in which the public and the railroad, express, telephone or telegraph company affected thereby is interested, and such findings when so introduced, shall be conclusive evidence of the facts stated in such finding or findings as of the date of filing under conditions then existing, and such facts can only be controverted or contradicted by showing a subsequent change in conditions bearing upon the facts therein determined."

It is admitted that no appeal was taken by the relator from the findings of the commission, and that in all proceedings, other than a hearing before the board of equalization, they are binding and conclusive upon the railroad company and upon the state.

At the same session of the legislature an act entitled, "An act to provide for the assessment of the operating property of railroads," (Laws 1907, p. 132, chap. 78; Rem. & Bal. Code, § 9141 *et seq.*) was passed. It is provided in § 1 that the state board of tax commissioners shall make an annual assessment of the operating property of all railroad companies within this state, for the purpose of levying and collecting taxes as thereinafter provided. After a definition of terms, it is provided, that the board shall have access to all books, papers, documents, statements, and accounts; that it may require returns to be made of all information called for by it; that it may summon witnesses and compel the production of books and papers; and further, that it should require the statement under oath of certain facts touching the business and value of the property of such corporations, including the market value of the shares of capital stock, funded debts, etc., the value of its bonds and other securities, its mileage and gross earnings, and such other facts and things as the board might require. It is further provided that the board shall, on or before the 1st day of March and the 1st day of June in each year, according to their best knowledge and judgment, ascertain and determine the true cash value of the property of each railroad company within this state, and that every such company shall be entitled to a hearing, and present evidence. It is also provided, that the value of property of railroads for assessment shall be made as of the same time and of like manner as the value of general property of the state, and that for the purpose of determining the true cash value the board might, if it deemed necessary, view and inspect the property of such company; that it should take into consideration the value of the entire system and mileage

of the whole system, and that upon the completion of such assessment, the board should give notice by mail to each railroad company assessed of the amount of its assessment as entered upon such rolls. The act putting these duties upon the tax commission passed the House February 11, 1907, and the Senate February 20, 1907, and was approved by the governor March 6, 1907. It was passed without an emergency clause. The act amendatory of the railroad commission law, which gave that board power to find the physical value of the railroads, making its findings conclusive, passed the House March 8, 1907, and the Senate March 8, and was approved by the governor March 16, 1907. This act was passed with an emergency clause.

It will thus be seen that we have two acts of the same legislature giving to two different boards the power to find the value of railroad property. Accordingly, in the year 1910, the state tax commission undertook to value the property of the several railway systems. It adhered to the values fixed by the railroad commission, in so far as the Northern Pacific and the Great Northern Railways are concerned, but increased the value of the property of the relator from $19,500,000 to $27,529,771. This act was confirmed by the state board of equalization, which is made up of the members of the state tax commission, sitting with the state auditor and the state land commissioner, and a levy against the property of relator was made on the basis of the added value. An appeal was taken to the superior court, and from an adverse judgment, relator has appealed.

It will be admitted, as a general rule of statutory construction, that repeals by implication are not favored, and that where there are two or more provisions relating to the same subject-matter they must, if possible, be construed so as to maintain the integrity of both. So that, while a large part of the briefs is taken up with a discussion of cases tending to sustain the respective contentions of counsel, we think it would serve no useful purpose to review them. For, after all,

statutes are to be construed by reference to certain fixed and well-known principles, and the cases relied on are but instances of the application of these principles. Therefore, we may adopt the following text as applicable to the case at bar:

"The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each; if, however, they are necessarily inconsistent, a statute which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature; and of two inconsistent statutes enacted at the same session, that will prevail which takes effect at the later date." 36 Cyc. 1151.

"The construction of a particular provision of a statute should always be given with reference to the object of the statute, the connection in which such provision stands, the evident intention of the legislature, and the change which the whole statute shows it to be the purpose to effect, or, in other words, the evil it was intended to remedy. By considerations suggested by such reference to the whole statute, general words are often restricted in their application, and they have been deemed to be so limited in this instance." *Wheeler v. McCormick*, Fed. Case, No. 17,498.

It is not alone the time of passage that is to be considered in matters of this kind, but the object to be accomplished and the manner of its accomplishment. The amendment to the railroad commission act was not only passed and approved subsequent to the passage of the tax commission act of 1907, but as against the uncertain "bookkeeping," "stock and bond," and "capitalization" methods of ascertaining value, to which the tax commission was empowered to resort, with a view of the property if it deemed it necessary, the railroad commission was directed to find the actual value of the property; not by resort to bookkeeping methods or at the

peril of the fluctuating stock market, but by reference to the cost of reproduction; not the market value of its stock, but the real value of its property, considering its physical character and its earning capacity. In other words, it was provided that the property of railroads should be valued as the stock of the merchant or the land of the farmer is valued. Although we are reminded by counsel that the taxing authorities are not bound to consider physical value, but may resort to the "stock and bond" or "capitalization of earnings" method of taxation, we are undivided in our answer that it was undoubtedly the intent of the legislature, mindful of the evasions of railroad companies in years past, to avoid these methods and to put them upon the same plane as the individual whose acre is under his feet. Such methods were and are unfair—unfair to both parties to the tax; and we may well assume that, in passing the amendment to the railroad commission act, the legislature intended just what it said, that *when ascertained*, the value fixed by the railroad commission, after a full judicial hearing and with the aid of its engineers, accountants, experts, and practical and experienced men in every department of railroad engineering, accounting, and construction, should be binding and conclusive upon the public and upon the railroad companies. The legislature intended that the commission's findings should leave no doubt or uncertainty, and they are conclusive as made, unless revised by the courts in a proper proceeding.

But, if this be so, the two acts are not necessarily repugnant. Both may stand; the tax commission having full power to estimate the value of the property, until such time as the railroad commission may conduct its hearing, and return, for the benefit of the whole state and of its officers, the true value of the property.

There is another reason for our conclusion, not noticed by counsel. Courts are not at liberty to speculate upon legislative intent when that body, having subsequent opportunity, has put its own construction upon its prior enactments.

Our conclusion in this behalf is strengthened by reference to the public utilities act of 1911 (Laws 1911, p. 538, chap. 117). Section 92 of the public utilities act re-writes the provisions of § 12 of the original railroad commission act and all amendatory acts, and it is there provided that:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission shall be admissible in evidence in any action, proceeding or hearing in which the state or any officer, department or institution thereof, or any county, municipality or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined. When the commission shall have valued the property of any public service company, as provided for in this section, nothing less than the market value so found by the commission shall be taken as the true value of the property of such company used for the public convenience for the purposes of assessment and taxation."

We have, therefore, not only in the act of 1907, but in the act of 1911, evidence of the fact that the legislature intended to arrive at the value of railroad property by a judicial process; and when that value was found, it was to be conclusive upon all parties as well as the state, and if the act of 1907 has hitherto seemed doubtful, care was taken in the act of 1911 to clear the doubt by adding that the findings of the commission should be taken as the true value of the property for the purposes of assessment and taxation.

It is further contended that, in any event, the value of the property as equalized being less than the value as ascertained by the tax commission, the relator is not harmed, because it is not called upon to pay a tax upon its full value. While theoretically all property should be assessed at its full value, it is well known that it is not so; that while the taxing author-

ities have undertaken to, and have with a greater or less degree of accuracy arrived at that true value, yet a certain percentage is accepted as a basis of valuation for tax purposes. There would be merit in this contention but for the fact that it is admitted that like property of other railroad corporations has not been so assessed. The value as fixed by the railroad commission was accepted in all other cases, and to sustain the finding of the board of equalization would be to put an unequal burden on the relator, thus violating the guaranties of the constitution. To these guaranties the courts cannot be blind.

Nor does the recent case of *Doty Lumber & Shingle Co. v. Lewis County*, 60 Wash. 428, 111 Pac. 562, militate against our position. There the tax was fixed by officers having authority to fix the value, and the record shows that:

"In raising the assessment upon the timber lands of the several appellants after the hearing, the tentative bases were not strictly adhered to, but the board took into consideration the distance of the property from a logging stream or a commercial railroad, and the contour of the land as affecting the expense of getting the timber to market. In short, it fixed values on the basis of the quality of the timber and its accessibility to market."

The value for taxation purposes had been made by the proper officers, after due inquiry and upon a proper legal basis. Here the effort to raise the property valuation of this relator, as against those possessed of like property, proceeded upon a fundamentally wrong basis. Not only was the raise made by those having no authority to do so, but so far as the record shows, there was no basis in fact for the increased valuation. There was no inquiry such as is contemplated by the act relied on. Starting from a wrong premise and without authority in law, no virtue could come of the tax commission's order, and relator, being as clear upon the record as those who own like property, is entitled to have it assessed upon the same valuations and the same percentages as fixed in other cases for the tax levy. As said in the *Doty* case,

one who is called upon to pay a tax upon "the true and fair value" of his property cannot complain because some other person is assessed at a lower valuation, so that the *Doty* case is really in line with our present reasoning, for the "true and fair value" being fixed by the railroad commission, it alone having power to determine that fact, any raise of valuation would give it just cause of complaint and exempt it from the limitations of the *Doty* case.

We have followed at some length the arguments and theories of the respective parties, believing that the importance of the case demands it. But the writ must issue for another reason. It is asserted that the order of the tax commission was arbitrary, and there is nothing in the record to show that it is not so. No evidence was before the board of equalization other than that to which we have referred and all of which was offered by the relator. Hence, it follows that the board of equalization, arbitrarily and without reference to the provisions of chapter 78, Laws 1907, p. 132 (Rem. & Bal. Code, § 9141 *et seq.*), or the evidence before it, raised the value of relator's property above that of the owners of like property. Nor can we presume, as invited by counsel, that it had such evidence before it. Such would be the rule upon collateral attack. But here we have a direct appeal from the board and upon the record as there made, and no presumptions can be indulged in favor of the record. But without sifting reasons or statutes, it would seem, on general principles of the law, that the value fixed by the board of equalization cannot be sustained. The value of a property constructed of material things can be approximated with reasonable certainty. There are doubtless many elements which conduce to a correct determination of the true value of property, and which may properly be considered. The manner of making the inquiry is not so important when the question of the true value of the property is involved. The property can have but one true value, whatever may be the purpose of the investigation; whether it be for the purpose of fixing

reasonable rates for transportation of passengers, or carrying freight, or for the purpose of taxation, "the rule to be applied in ascertaining the value of the property should be the same. . . . The same property cannot rightfully be valued at one sum for one of the purposes mentioned, and at a different amount for the other." *State ex rel. Bee Bldg. Co. v. Savage*, 65 Neb. 714, 91 N. W. 716.

By the law of this state railroads can charge no more than a fair return on a fair value of its property. This has been defined as just compensation by the highest tribunal in the land. Such rates can only be ascertained by deducting fixed charges, of which taxes are certain items. Hence, we may admit respondents' contention that the power of the railroad commission was limited in the act of 1907 to the ascertainment of value for rate-making purposes only, without weakening our argument. This court knows, as does every citizen, that in fixing rates the primary rule, in this state at least, is to find the true value of the property, considering its earning capacity, and after making due allowance for fixed charges, depreciation, and taxes, that the rates shall be so adjusted as to allow a fair interest return, and no more. To limit an income to a fair interest return on a certain sum and demand a much greater valuation as a basis for taxation would be manifestly unjust. If applied in the case of the citizen it would lead to rebellion, and if applied in the case of corporate property would result in confiscation; for if the power is admitted, there would be no limit to the arbitrary will of the officers to whom the power of taxation is delegated.

"The state is too just in the administration of its laws to insist that railroad property should, for taxation, be considered as of very great value, and for the purpose of regulating rates to be charged by such corporations as common carriers, that the value of the same property is altogether lower." *State ex rel. Bee Bldg. Co v. Savage, supra.*

Believing, first, that the railroad commission having by judicial process ascertained and returned the true value of re-

lator's property, the tax commission had no power to fix a different value, or if it be not so held, that the value as fixed by the board of equalization was arbitrary, the judgment of the superior court is reversed, and the cause remanded with directions to enter an order, fixing the valuation of the properties of the relator in the state of Washington for taxation purposes, for the year 1910, at $19,500,000, and that the same percentage of its value be taken as a basis for the levy as was taken in considering like property belonging to others.

DUNBAR, C. J., GOSE, ELLIS, MOUNT, PARKER, MORRIS, and CROW, JJ., concur.

FULLERTON, J. (concurring)—I concur in the judgment ordered on the first ground stated. I do not think the acts of the taxing officers were arbitrary or capricious.

[No. 9436. Department One. June 12, 1911.]

RALPH O'DELL, *by O. B. O'Dell, his Guardian etc., Appellant*, v. NORTHERN COAST TIMBER COMPANY *et al.*, *Respondents.*[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO WARN—OBVIOUS DANGERS. An experienced logger, 21 years of age, is not entitled to recover for injuries sustained by reason of failure to warn him of the dangers to which he was exposed, and which were so obvious and apparent as to preclude a recovery, where it appears that he was directed to signal a railway train to stop until a cable across the track could be removed, that he stationed himself on a log and on the opposite side of and near the cable when the train was three or four hundred yards away approaching at 35 miles an hour, and remained there until the engine was only two lengths away, and then ran back and was struck by the cable, when he had ample time to place himself in a safe place, there being abundant safe places from which the signal could be given.

DUNBAR, C. J., dissents.

[1]Reported in 115 Pac. 1085.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 28, 1910, upon the verdict of a jury rendered in favor of the defendants by direction of the court, dismissing an action for personal injuries sustained by an employee in a logging camp. Affirmed.

Stevenson & Sorley, for appellant.

Hayden & Langhorne, for respondents.

MOUNT, J.—Plaintiff brought this action to recover for personal injuries. At the close of the evidence offered on behalf of the plaintiff, the trial court directed a verdict in favor of the defendants. Plaintiff has appealed from a judgment of dismissal.

It appears that the defendant, Northern Coast Timber Company, operated a logging camp near the town of Mineral, in this state. The Tacoma Eastern railroad passed through the place where the logging operations were being conducted. The logging company was required to drag logs over this railroad track. In order to do so, two donkey engines were used. One of these engines was stationed about two hundred feet on the easterly side of the railroad, and the other about the same distance on the westerly side thereof. One of these engines was used in dragging logs from the woods, and the other engine would then take the logs and drag them across the railroad track. In order to do this work, it was necessary to have a wire cable, about five-eighths of an inch in diameter, across the railroad track. Logs had been placed against the ends of the ties of the railroad track on each side thereof, a little higher than the rails, so that the logs being dragged over the railroad would not injure the rails of the railroad track. The wire cable lay across these logs and, when it was not in use, it would sag down somewhat. Sometimes it would rest upon the tops of the rails.

Plaintiff was employed by the Northern Coast Timber Company on March 15, 1910, as a rigging slinger. It was

his duty as such rigging slinger to assist in moving and setting the donkey engines. He continued this work until the 29th day of March, 1910, when he was set to work as a chaser. His duty as chaser required him to follow the logs as they were drawn across the railroad track from one donkey engine to the other. In case a train approached upon the railroad, it was his duty to go to the railway and flag the train to stop, so that the cable could be removed until the train passed by. On the 29th day of March, while the plaintiff and the foreman of the Northern Coast Timber Company were working about one hundred feet from the railway track, they heard a train approaching from the north. The foreman told the plaintiff to "run out to the track and flag the train." Plaintiff ran down to the track along the way logs had been dragged, and stationed himself upon the logs over which the cable extended across the railway, and about nine feet south of the cable. He saw the train coming about three or four hundred yards away. He signaled with his hands for the train to stop, but it did not do so. When the train had approached within about two car-lengths from him, going, he says, at the rate of about thirty-five miles an hour, the foreman called to him, "Let her go." Plaintiff says he then stepped back from the track and, as he did so, the train caught the wire cable, which struck him and broke his left leg about the ankle. Plaintiff, at the time of his injury, was between twenty and twenty-one years of age, and was experienced in logging operations, but had no previous experience where a cable lay across a railroad track. The trial court was of the opinion that the danger was obvious, and that the plaintiff assumed the risk and contributed to his injury when he placed himself on the opposite side of the cable in front of the swiftly moving train, and therefore directed a verdict for the defendants.

Appellant argues that the danger was not apparent, and that it was the duty of the foreman to warn the plaintiff of the danger of standing on the side of the cable opposite the

approaching train. While the foreman of the respondent timber company directed the plaintiff to "run out to the track and flag the train," it is not claimed that the plaintiff was directed to go to any particular place. A very natural thing for him to have done would have been to stand in the middle of the track between the rails, and from that point signal the train to stop. It is obvious that in such position he would require no warning from the master to get out of the way of the train when he saw it would not stop. When the plaintiff arrived at the railway track, the approaching train was three or four hundred yards away. He had abundant time to place himself in a safe place, and the foreman no doubt assumed that he would do so. The plaintiff testified that, when he arrived at the track, the cable sagged down from the logs which it crossed, and rested on the top of the rails. He stood upon the log over which the cable lay and from "six to nine" feet south of the cable, with the train approaching. He signaled with his hands for the train to stop, but got no answer. He remained there until the train was about two car-lengths away, and when he saw there was no intention to stop, instead of stepping over the cable to the side to which the train was approaching, as he might readily have done, he stepped back from the track. There appears to have been no necessity for him to stand near the cable as the train passed. Safe places were abundant from which the signal might have been given, and we think the foreman was not required to tell him where to take his station in reference to the cable, when it must have been apparent to one of plaintiff's age and experience that there was certainly some danger in standing so near the cable when there was no necessity therefor. When the danger is not a latent or hidden one, but is obvious, there is no duty to warn. *Props v. Washington Pulley & Mfg. Co.*, 61 Wash. 8, 111 Pac. 888; see, also, *Hage v. Luedinghaus*, 60 Wash. 680, 111 Pac. 1041.

We therefore think the trial court properly granted the

motion for a directed verdict, and the judgment must be affirmed.

PARKER and GOSE, JJ., concur.

DUNBAR, C. J., dissents.

[No. 9394. Department One. June 12, 1911.]

DICKINSON FIRE & PRESSED BRICK COMPANY, *Respondent*, v. CROWE & COMPANY, *Appellant*.[1]

SALES—WARRANTY OF QUALITY—WAIVER—RESCISSION — DAMAGES FOR BREACH. Upon a sale of brick for a Federal building, the purchaser waives the right to rescind the sale for defects as to quality by delaying for sixteen months to give the seller any definite information regarding the number of brick rejected by the supervising architect; and in an action for the price can only offset such damages as it has sustained.

SALES — ACTION FOR PRICE — COUNTERCLAIM — DAMAGES. Where brick of varying size and color were mixed at the request of the buyer, who knew that they were dirty and needed cleaning, in an action for the price an offset of $100 damages for expense in sorting and cleaning the brick is an ample allowance, there being no definite testimony to show that such expense should not have been anticipated from a mixture of the grades.

SALES—ACTION FOR PRICE — INTEREST — COUNTERCLAIM. Upon a cash sale of brick, an unliquidated counterclaim for damages for breach of warranty as to quality will not prevent the recovery of interest from the time the demand accrued on the balance found due.

Appeal from a judgment of the superior court for King county, Gay, J., entered July 6, 1910, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

John E. Ryan and *Grover E. Desmond*, for appellant.

Douglas, Lane & Douglas, for respondent.

[1]Reported in 115 Pac. 1087.

Gose, J.—This is an action to recover the balance due upon a quantity of brick. From a judgment in favor of the plaintiff, the defendant has appealed.

The respondent sold to appellant four car loads of pressed brick, f. o. b. cars at Dickinson, North Dakota. The shipments began April 14, 1906, and ended upon August 16, 1906, that being the date of the last shipment. The suit was commenced in September, 1909. The appellant admitted the sale and delivery of the brick, and alleged affirmatively that the brick was sold and delivered to be used in the Federal building at Seattle, subject to inspection and acceptance by the officials of the government; that brick of the value of $132.29 was rejected by the contractor and government officials for nonconformity with samples furnished; that it stored the rejected brick at the request of the respondent, incurring a cartage liability of nine dollars; that the reasonable value of the storage is $21; that in consequence of the failure of the respondent to supply brick of the quality and size of the samples furnished by it to the contractor and government officials, the appellant has become liable for, and has been charged by the contractors, the sum of $252 for extra labor in sorting and laying the brick. The court allowed the appellant a set-off of $15 per thousand on 7,000 brick, $105, and $100 for expense incurred in cleaning and sorting the rejected brick, and entered judgment for the respondent for $638.40, with interest from October 9, 1906.

The appellant first contends that this was a sale by sample, and that in such cases "there is an implied warranty that the bulk of the goods shall correspond in kind and quality with the sample exhibited." If the premise were sound, the rule stated would follow. The evidence, however, is that, while the respondent knew that the brick was purchased for use in the Federal building, and forwarded samples, it expressly advised the appellant that the five samples were to be considered as a whole; that if it were required to furnish brick equal to the best sample, it could not fill the order; that it

had ten and possibly fifteen thousand brick of the best sample furnished, and that "the dust has blown into the pile some; all are soiled more or less." It further advised the appellant as follows: "Our reason for sending duplicates of the samples to you was to make sure that you fully understand what we can do and to enable you to explain to the supervising architect, if you think it is worth while. Otherwise, we will be pleased to have the contractors look elsewhere for the brick." After the receipt of this information, the appellant advised the respondent to ship and to "mix" the several kinds in the first car. It further advised it that: "The superintendent says that you are to ship this 18 R 2 of which you claim to have about 10,000, and then 18 R 5 and 18 R 3 are satisfactory to him and he will accept them. Of course, keep this quiet." 18 R 2 was the best of the samples. It is contended that about 7,000 brick were rejected. Of this number the appellant sold about 4,000 and appropriated the proceeds. It claims to have the remainder in store, and insists upon the right to rescind the sale as to these and to hold the respondent responsible for cartage and storage. If we should concede that there was a breach of warranty, the rule is that a failure to give notice, or to offer to return the property within a reasonable time after discovering the defects, operates as a waiver of the right to rescind, and leaves the purchaser only the right to recover or offset damages to the extent of the diminished value of the article. *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. 890; *Kleeb v. Long-Bell Lumber Co.*, 27 Wash. 648, 68 Pac. 202; 35 Cyc. 434.

On April 6, 1908, sixteen months after the date of the last shipment, the appellant advised the respondent that 3,484 brick of the third shipment had been rejected by the contractors. This was the first advice of the quantity rejected. On May 29, 1906, the appellant wired the respondent: "Number of brick condemned. Not according four samples accepted. Poor quality, badly discolored, etc." On the same

date it advised by letter to the same effect. There was never an offer to rescind or to hold the rejected brick subject to respondent's order, nor any definite information to it as to the number rejected, until the letter of April, 1908. The appellant must, therefore, rely upon its right to offset such damages as it has sustained.

The testimony of the appellant's witness Mr. Grant, who was superintendent of the construction of the Federal building, makes it clear that a part, if not all, the condemned brick were rejected because they did not conform to the best of the five samples. A Mr. Mathews, foreman for the contractors, testified that the expense of "resorting and gauging" was about $300, and that the greatest expense was in cleaning the brick. Mr. Duhamel, one of the contractors, testified that some of the brick first shipped were dirty and seemed to have been on hand for a long time; that the next shipment varied in size and color, and that the damage consisted of the extra labor in sorting "and labor on the brick." Respondent's witness, Dr. Brannon, testified that on August 13, 1907, a year after the date of the last shipment, one of the contractors, Mr. Duhamel, told him that the added expense of sorting and laying the brick would not exceed $100. This statement is not denied by the contractor. The appellant knew that the five samples varied in quality; that "dirt" had blown into the brick, and that "all" were "soiled more or less." As the trial court pointed out, there is no definite testimony in the record as to how the brick shipped differed in color and size from what would be reasonably anticipated from a mixture of the several samples. We think, upon the entire record, the amount allowed as a set-off is ample. Indeed, a much less allowance could have been made.

It is finally said that the court erred in allowing interest prior to the date of the entry of the judgment. There is nothing in the record to indicate that the parties did not contemplate a cash sale. The purchase price was agreed upon prior to the date of the first shipment. Interest is allowable

on a liability to pay money from the time the demand accrues, where the amount can be ascertained by computation. *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381. The existence of a set-off or counterclaim, which is unliquidated, will not prevent the recovery of interest on the balance of the demand found due from the date of its maturity. 22 Cyc. 1514.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9560. Department Two. June 13. 1911.]

JOHN JOHNSON, *Respondent*, v. L. P. INGRAM *et al.*, *Appellants*.[1]

LIMITATION OF ACTIONS — REAL PROPERTY — ADVERSE POSSESSION. One claiming land by adverse possession, inclosed and held by him under a mistake as to the true boundary line of lots purchased by him, cannot invoke the seven-year statute of limitations for the recovery of land held under color of title; since the paper title is in the true owner, and the ten-year statute applies.

ADVERSE POSSESSION—MISTAKE AS TO BOUNDARY—ESSENTIALS—INTENT. Whether the inclosing of land of another under a mistake as to the true boundary line constitutes adverse possession is a question of fact, depending upon intent and disseizin of the owner at the time.

SAME—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows an adverse holding constituting title after the lapse of ten years, where the purchaser of lots took possession and fenced the land according to the lines established on the ground, and built a house thereon and occupied or rented it and paid taxes for fourteen years, believing that he had purchased the identical land, and without any notice of a mistake in the survey in locating the lines, which was not discovered until after the period of limitation had run.

SAME—ESTOPPEL TO ASSERT ADVERSE POSSESSION—EVIDENCE—SUFFICIENCY. After a title ripens by adverse possession, evidence to sustain an estoppel must be clear and convincing; and it is not enough

[1]Reported in 115 Pac. 1073.

that one in adverse possession for fourteen years moved his house across the line of a new survey, as he claimed to get it on higher ground, where he still claimed the title in good faith, attempted to pay taxes upon the whole tract, and instituted a suit to quiet title and to restrain the erection of a building shortly after construction was commenced.

IMPROVEMENTS—ACTION TO RECOVER LAND—COUNTERCLAIM FOR BETTERMENTS—STATUTES—RELIEF. Under the betterment act, Rem. & Bal. Code, § 797, providing that, in an action for the recovery of real property from one holding in good faith under color or claim of title, the value of permanent improvements and the amount of taxes paid must be allowed as a counterclaim to the defendant, one having in good faith acquired record title and entered into peaceable possession and commenced the erection of a building is entitled to a counterclaim for the taxes paid and the value of the building by him erected pending a suit to quiet title brought by one who had acquired actual title by adverse possession under a mistake as to the true boundary; and no damages having been shown, the decree should secure payment of the same, or, in default thereof, make the parties tenants in common according to their proportionate interests.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 8, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Modified.

Carkeek & McDonald, for appellants.

Longfellow & Fitzpatrick and *W. R. Bell*, for respondent.

CHADWICK, J.—In the year 1890, respondent purchased lots 11 and 12 in the J. J. Moss first addition to Seattle, and went into possession. A house had been erected by his grantor. He cleared and fenced the lots and built a bulkhead along one side thereof. He erected necessary outbuildings so as to make it a comfortable and convenient home, and it has since been occupied by his tenants. South of the Moss donation land claim was a tract of land belonging to the Ladd estate. This was surveyed and platted in 1904, when it was discovered that lot 5, in block 25 of Ladd's second addition to Seattle, covered all of lot 11 and a part of

lot 12 in block 31 of Moss' addition, being the property owned by respondent. Lot 5 in block 25, Ladd's addition, extends seven feet south of lot 11 in Moss' addition, so that seven feet of the land now occupied by a building which appellants have erected on the disputed property is not in controversy.

At the time the Ladd tract was platted, a line was run through, and the lots and blocks were staked on the ground. Although respondent denies any knowledge of these stakes, he admits that he talked of the survey in 1904 with a Mr. McFarland, who had bought lot 5 in Ladd's addition. Up to the time the Ladd tract was platted, taxes were paid by respondent and by the Ladds on the same property; but upon the filing of the Ladd plat, the county treasurer segregated the property on the rolls, and thereafter refused to accept taxes for that part of respondent's property lying over the Ladd line. At this time respondent was informed by the county treasurer of the adjustment of the lines, and of his reasons for refusing to accept the taxes. He then went to the resident agent of the Ladd estate, and sought to obtain a deed to the property. He found, as noted above, that it had been previously conveyed to another. Respondent, at or about this time, moved his house forty feet north, or just over the line between the Moss donation claim and the Ladd property. He has not since that time paid taxes or local assessments. These have been paid by the grantee of the Ladds, appellant's grantor. It is only fair to state that respondent says he moved his house because the sills were rotting, and he wanted to get it on higher ground, and that the party employed to do the work moved it further than he intended that it should be moved. Respondent lived at the town of Kent some miles away, and the work was done under the direction of an agent.

After the house had been moved and after respondent had notice of McFarland's claim to the property, he made McFarland his agent, and he thereafter collected the rents and

looked after the property for respondent. McFarland testifies, however, that he told the tenants that he owned the south 47 feet of the lot, all of which was inclosed by respondent's fence. In the year 1910, McFarland sold lot 5 of the Ladd tract to appellants, who entered into possession. They tore down the fence and dug a basement and erected a foundation covering the entire area of lot 5. After they had assembled their material, respondent brought this action to quiet his title and restrain further interference with the property, which he claimed as his own. Upon preliminary hearing, the court refused to grant a temporary restraining order. Pending the trial, appellants have erected and equipped a modern apartment house at a cost of $8,000, all of which, except the south seven feet, is on the disputed ground.

It is the theory of respondent, and it was so held by the trial judge, that respondent's title to the disputed property had ripened under the statute of limitations. It will be admitted that the paper title is in appellants, and therefore the seven-year statute of limitations cannot apply. So that our inquiry is limited to a consideration of the ten-year statute. Whether the fencing of property of another, under the mistaken notion that it is upon the true line, will start the statute of limitations cannot be decided as a matter of law, without resort to the facts of the particular case. *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, was a case arising out of mistaken boundary. In that case the court said:

"As heretofore observed by this court, the question of adverse possession is one of fact; and, though the fence may have been established originally by mistake, if it were followed by a claim to the land and such acts as clearly evinced a determination of permanent proprietorship, the claim is established. The intention of the party claiming adverse possession, and also the notice of such claim to the real owner, must be inferred from the acts and declarations of the parties."

And in the same case the following exception to the rule

was, upon the authority of *Caufield v. Clark*, 17 Ore. 473, 21 Pac. 443, 11 Am. St. 845, adopted by this court:

"If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure, but if ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse."

The rule of disseizin is thus defined in *McNaught-Collins Imp. Co. v. May*, 52 Wash. 632, 101 Pac. 237:

"In order to constitute adverse possession there must be a disseizin of the owner at some particular time. The possession must be open and notorious in order to give notice to the owner, so that he may have an opportunity to try title with the possessor, or usurper, as he may be termed. It must be continuous and exclusive, of course, and under color of title or claim of right, in good faith; otherwise the claimant would simply be a common trespasser."

In *McCormick v. Sorenson*, 58 Wash. 107, 107 Pac. 1055, 137 Am. St. 1047, which up to the time of the Ladd survey is on all fours with the case at bar, the court, still holding that a right could be initiated in a mistaken boundary, said:

"While it is true that Taylor originally made a mistake in fixing the lines, and by reason thereof unintentionally entered into the possession of lot 3 and part of lot 4, it is nevertheless apparent from the evidence that his possession thus obtained was immediately followed by a claim of right to the land; that he and his grantees erected a dwelling house and other buildings; that they planted fruit trees and otherwise improved the place; that each of the subsequent purchasers, before buying, went upon the property, saw the inclosure and improvements, intended to acquire the identical land so inclosed and improved, and that their mistake was not as to the particular land claimed or purchased, but as to its true description. These acts, which continued without interruption for a period of more than ten years, and until the

commencement of this action, certainly evinced an assertion of permanent proprietorship on the part of respondents and all of their grantors, back to and including Taylor, and constituted notice to the real owners."

Appellants seek to distinguish these cases from the one at bar by quoting the respondent's testimony tending to show that he did not intend to claim beyond the true line of the Moss donation land claim:

"Q. And you supposed at the time you built that fence that that was the correct line, did you not, of your lots? A. Yes, sir. Q. And you always supposed that was the correct line of your lots until the Ladds run their lines there? A. Until we were stopped the taxes. Q. And you always supposed that that fence divided you from the Ladd property? A. Yes, sir."

We may well question whether the line of a donation claim or government subdivision is ever in the mind of the purchaser of town lots. Certainly there is nothing in this case to indicate that any lines other than the lot lines were considered by the purchaser. This is evidenced by the fact that he measured and fenced the lots as they had been laid out by Moss, and has claimed them as his own for more than ten years. In the case of *Schlossmacher v. Beacon Place Co.*, 52 Wash. 588, 100 Pac. 1013, the same question was before the court. There the one who had made entry testified as follows:

"Q. Where was your north line? A. It was right on a line with Dearborn street. Q. When you went there, your idea was to take possession, of course? A. Certainly. Q. Of just what your deed called for? A. Just that. Q. You had no intention of taking possession of any more property than you were entitled to under your deed? A. No, sir."

The court, speaking through Judge Morris, said:

"Appellant urges that this testimony shows the possession of the Nelsons was not under a claim of right, and cites *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803. The rule announced in that case is: 'If a party only claims to a given line, and makes no claim as to where such line is located, his adverse possession is limited to such line wherever the same

may be established.' That case is not controlling here, for the reason that the testimony shows that the Nelsons *did make a claim* to their true north line as the south line of Dearborn street, and that for over fourteen years they openly and notoriously claimed this line by the maintenance of the bulkhead as their true north line. The rule applicable to the facts in this case is as held in *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, adopting the doctrine of *Caufield v. Clark*, 17 Ore. 473, 21 Pac. 443, 11 Am. St. 845: 'If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure.' The Nelsons may have been mistaken in regarding the south line of Dearborn street as their true north line, but they did so regard it; not under any theory of an intention to hold only to the true line, as it might be subsequently ascertained, as in *Wilcox v. Smith*, *supra*, but under the belief that their deed called for such line as the true boundary line, and a manifest intention on their part to so regard it and hold it as against all the world."

It is admitted that, if respondent's title had ripened, his subsequent acts would not defeat it, but are competent to be considered as indicating the intention of respondent at the time of his entry. Under the authorities cited, there can be no doubt that the respondent's title had ripened at the time the Ladd survey was made, and that his subsequent conduct with reference to that survey could not be held to color his original entry. We hold, therefore, that all that was done, considering the lapse of time, was not inconsistent with an original claim of right adverse to appellants grantors. So that, under the authorities cited, it is apparent from the whole record that respondent bought the land in good faith and occupied it for a time sufficient to ripen a title under the statute of limitations.

It is also apparent from the whole record that appellants bought the land in good faith. It is true that they knew of respondent's claim. That had been brought to their notice, but they say that they understood that respondent was satisfied with the line as it had been run on the Ladd survey. They were furnished an abstract showing a paper title.

They went into possession and at once began the erection of a valuable building. They were within the lines of their paper title, and while thus engaged had conversation with respondent in which he made no claim to the property, although he shortly thereafter began this action. A court of competent jurisdiction had refused to grant an order restraining the erection of their building. It is true that respondent moved his house shortly after the Ladd line was run, and that the Ladd grantees paid all taxes and local assessments; but evidence to sustain an estoppel, where title to real property is involved, should be clear and convincing; and, while the conduct of respondent might well be construed for or against him and the conscience of the court be satisfied, we question whether there is sufficient in the record to warrant us in saying that we are satisfied that he should be estopped to claim the title which the lapse of time had earned for him. Both parties bought in good faith, and have taken the land within the calls of their deeds. Up to 1904 there was no cloud or question upon respondent's title so far as the record discloses, nor did the Ladd estate have actual notice or knowledge of the entry of respondent. Each party had color or claim of title, and each made expenditure of money upon the property and in good faith, and, if possible, both should be protected. In 1903 the legislature passed what is known as the betterment statute, § 1 of which reads as follows:

"In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant." Laws 1903, p. 262, § 1 (Rem. & Bal. Code, § 797).

But for this act we would be inclined to hold that respondent was estopped. But the act is general in its terms, and

seems to have been passed to meet the equities of just such cases as we have now before us, and to permit the courts, where hardship would follow even the application of equitable principles, to do even justice between the parties, giving each an opportunity to save that which in good faith he has asserted as his own.

Under a statute somewhat similar to, though not as sweeping as our own, it was held by the supreme court of Wisconsin that the value of the improvements might be recovered. It was said:

"It is the entry upon the possession under the color of title asserted in good faith which creates the possession which entitles the possessor to recover for his improvements; and it is unnecessary that the person making the entry should believe that his title was superior to every other title to the property at the time of making his entry, in order to make his possession adverse; nor does a subsequently acquired knowledge that there is a better title in some other person necessarily change the nature of his possession from an adverse possession to a possession subordinate to the true title. In order to change the nature of the possession, there must not only be a knowledge that there is a better title, but there must be an express or implied yielding to such superior title." *Barrett v. Stradl*, 73 Wis. 385, 399, 41 N. W. 439, 9 Am. St. 795.

To sustain this doctrine, many cases are cited. The same rule was declared in *Templeton v. Lowry*, 22 S. C. 389. A betterment statute was there invoked, and the court said:

"So, too, the question as to *what* a party is entitled to recover is not left in any doubt, for the statute expressly declares that he is entitled to recover the value of *all* improvements made upon the land by the party from whom it has been recovered. There is no limitation as to the time when such improvements may have been made, whether before or after notice, or even knowledge of title in another. Here again there may possibly be room for legislative action, but certainly none for the action of the court. In fact, it might prove a very difficult task to fix any definite limit. It certainly would not do to say that where one has in good faith

bought and paid for a tract of land, honestly believing that he had obtained a good title and has commenced the construction of improvements, say the building of a dwelling house, he should be compelled to suspend the work when half complete, or run the risk of losing the value of what he might subsequently add, simply because he has received notice that some one else claims the land."

Under a statute which, like ours, makes color of title and good faith essentials of a right to recover, the supreme court of Arkansas said:

"The only requirements of the act, are that the occupant should have had peaceable possession, at the time the improvements were made, under color of title and under the belief that he was the owner of the land." *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701.

See, also, *Finnegan v. Campbell*, 74 Iowa 158, 37 N. W. 127.

We therefore hold that respondent is entitled to recover the property in dispute, subject to the payment within sixty days after the remittitur goes down of the value of that part of the building and improvements made thereon by appellants on the disputed property, together with taxes and assessments paid by them or their grantor, with interest at six per cent per annum (*Gould v. White*, 62 Wash. 406, 113 Pac. 159), in which event title to the improvements shall be confirmed and vested in him. If such payment be not made within sixty days, then appellants may within thirty days pay to respondent the value of the land apart from the improvements, in which event title to the land and improvements shall be confirmed in them. If neither party makes payment, they shall be tenants in common, each holding an interest proportionate to the value of the property, to be determined in the manner specified in the statute. The lower court made no finding of damages, and we find none of which a court of equity would take notice. In the record it appears that appellants claim their house to have cost them $8,000. There is evidence tending to show that respondent was willing at one time to take $1,700 for his whole property.

If the parties can settle on these values, they may so stipulate. If not, the lower court will find the values before entering a decree in accordance with this opinion. Remanded for further proceedings. Neither party will recover costs on appeal.

ELLIS, MORRIS, CROW, and MOUNT, JJ., concur.

[No. 8953. *En Banc.* June 14, 1911.]

J. G. CROUCH *et al.*, *Appellants*, v. CORNELIA A. FORBES, *Respondent*.[1]

FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSIONS. A broker's contract for the sale of real estate rests in parol, and is void within the statute of frauds, Rem. & Bal. Code, § 5289, requiring an agreement employing an agent to sell real estate for compensation or a commission to be in writing, where it appears that the vendor refused to sign a proposed contract giving the brokers the exclusive right to sell the land and retain all received over $12,000 as commissions, but later wrote that she objected to some parts of the contract, which she said no doubt could be fixed by a satisfactory talk, that they could send down their man and if they sold she wanted $12,000 net, and that they could keep the letter as a contract until they came down; although she afterwards consummated a deal with a purchaser procured by the brokers for $15,000; since the latter does not accept the terms of the contract and they cannot therefore be read together as one; and the statute requires that the amount of the compensation be fixed in the writing (DUNBAR, C. J., and FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered March 24, 1910, upon granting a nonsuit, dismissing an action for a broker's commission. Affirmed.

E. N. Steele and *Troy & Sturdevant*, for appellants.

G. C. Israel and *Frank C. Owings*, for respondent.

MORRIS, J.—Appellants sought in this action to recover $3,000, as commission upon a sale of real estate in which

[1]Reported in 116 Pac. 14.

they claim to have acted as brokers, and appeal from an adverse judgment.

The record shows that, on September 3, 1909, they went to the home of respondent, and after some preliminary conversation, drew up the following:

"Olympia, September 3, 1909.

"This is to certify that I, Cornelia A. Forbes of Mason county, Wash., the owner of the following described property, to wit: (describing the property) and that for the consideration of $1, receipt of which is hereby acknowledged, I give J. G. Crouch, of Olympia, Washington, the exclusive right to sell or purchase said property on or before April 1st, 1910. Price $12,000 net. Terms: Half cash, balance in one to five years at 7 per cent per annum, or all cash at the option of the purchaser. If the above described property is bought or sold by said J. G. Crouch & John C. Ellis, he is to have no per cent commission and all realized over and above the sum of $12,000. And I agree and bind my heirs to execute and deliver good and sufficient conveyance of said property to the purchaser, according to the terms of such sale, and to furnish abstract showing perfect title."

This writing was satisfactory to respondent, according to the testimony of appellants, but she refused to sign it for the reason that she had previously listed the property with another real estate agent, whose time would not expire until September 8, at which time, if not then sold, she promised to sign it and return it to appellants. On September 8 respondent wrote the following letter to appellants:

"Mr. J. G. Crouch, Kamilchie, Sept. 8, 1909.
"Olympia, Wash.

"Dear Sir:—The Elma real estate man's time has expired now, and if you have your man in view, bring him down. There are some parts in the contract you left which I do not like after carefully looking it over. But that can be satisfactory after a talk with you, no doubt. If you sell the farm I want $12,000, twelve thousand (net). You may keep this letter as a contract until you come down.

"Cornelia A. Forbes."

Appellants testify that, on receipt of this letter, they procured a purchaser for the farm, who subsequently purchased the same, paying $15,000. The question to be determined is, does the contract, in so far as it constitutes an agreement to pay a commission, fall within the statute of frauds. We are of the opinion that it does. Section 5289, Rem. & Bal. Code, provides that any contract or promise shall be void unless a memorandum thereof be made in writing and signed by the party to be charged, in the following cases: "(5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission." Assuming that respondent fully agreed to all that is set forth in the writing of September 3, she did not sign the writing evidencing the agreement, and it must rest in parol. The letter of September 8 is of itself insufficient to take the case out of the statute, as it does not contain a sufficient memorandum to indicate what the contract was; and if we take the first agreement to supply what is lacking in the letter, we have a contract partly written and partly oral, which is a parol contract. The statute requiring the contract to be in writing, in so far as it relates to the promise to pay a commission, and no such promise being found in the writing, we must look to the oral agreement to supply it, and that we may not do.

Counsel for appellants contend that the two writings should be read together as one, and thus reading them they constitute a contract in writing. That this is a proper rule ofttimes applied by the courts to take a case from out the statute of frauds is undoubted, but such rule is applied to situations where in the letter or other writing the oral agreement is acknowledged and either accepted or rejected, and the party submits to its terms or, confessing them, seeks to avoid them. The letter of September 8, however, neither accepts nor rejects the writing of September 3. Respondent does not submit herself to its terms, nor does she reject them. She says, by implication, that she is now ready to con-

tract. She does not like some parts of the contract submitted, but expresses her belief that a satisfactory agreement can be reached. The letter is silent as to what part of the agreement she accepts, or what part she rejects. The two taken together cannot, therefore, constitute a contract containing the terms agreed upon. If she had said in her letter: "I accept the contract as left by you," or: "I refuse to be bound by the terms agreed upon," the terms of the contract being undisputed, there would only remain the question whether the signing of the letter referring to it would be sufficient to avoid the statute, as in the cases relied upon by appellants. But there is no reference to any contract entered into. Respondent only expresses her willingness to enter into a contract, now that she is free to do so by reason of the expiration of the time given another agent. She refuses the proffered contract as unsatisfactory, and expresses her willingness to make a satisfactory arrangement, and fixes her price at $12,000 net.

Referring to the testimony of appellants, we find respondent, on September 3, refusing to make any contract for the sale of her farm until September 8, when it could be determined whether or not the Elma agent had effected a sale. So that, in any event, we cannot find an agreement even in parol to sell upon the terms offered in the writing of September 3. Neither is the clause in the letter of September 8: "If you sell the farm, I want $12,000 net," a promise to pay appellants all received over that sum as a commission. "$12,000 net" might mean the purchaser was to pay all costs and charges attending the sale, such as the cost of a proper conveyance or of mortgage securing any unpaid portion of the purchase price, or the cost of abstract, or the assumption of any liens or incumbrance then on the property. Finding, then, no promise in writing to pay any commission, we must sustain the judgment.

These views are in harmony with those expressed in *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473, wherein it is said,

quoting from *Zimmerman v. Zehendner*, 164 Ind. 466, 73 N. E. 920:

"The statute requires that the contract for the payment of a commission for the sale of real estate be in writing, and a written memorandum or acknowledgment of an oral contract will not fulfill the requirements of the law. . . . The important feature—the amount of commission to be paid—is to be ascertained by parol testimony . . . the exact thing which the statute was designed to prevent."

Forland v. Boyum, 53 Wash. 421, 102 Pac. 34, asserts the same rule.

For these reasons, the judgment is affirmed.

CHADWICK, ELLIS, GOSE, MOUNT, PARKER, and CROW, JJ., concur.

FULLERTON, J. (dissenting)—The appellants are real estate brokers. The respondent owned a farm situated in Mason county, and sometime prior to September 3, 1909, requested the appellants to visit her at the farm for consultation, with the view of entering into a contract for a sale of the farm on commission. On the date named, the appellants visited her as requested, when a proposed contract in the following form was drawn up and submitted to her:

"Olympia, September 3, 1909.

"This is to certify that I, Cornelia A. Forbes of Mason county, Wash., the owner of the following described property, to wit: (Description.) And that for the consideration of $1, receipt of which is hereby acknowledged, I give J. G. Crouch, of Olympia, Washington, the exclusive right to sell or purchase said property on or before April 1st, 1910. Price $12,000 net. Terms: Half cash, balance in one to five years at 7 per cent per annum or all cash at the option of the purchaser.

"If the above described property is bought or sold by said J. G. Crouch & John C. Ellis, he is to have no per cent commission, and all realized over and above the sum of $12,000. And I agree and bind my heirs to execute and deliver good and sufficient conveyance of said property to the purchaser,

according to the terms of such sale, and to furnish abstract showing perfect title."

After the contract had been prepared it was remembered that the farm had been theretofore listed for sale with a real estate broker residing at Elma, for a definite period of time which had not then expired, and by agreement of the parties the contract was left with the respondent with the understanding that she would execute it and forward it to the appellants as soon as she was at liberty to do so. The appellants then returned to their place of business, and a few days later received through the mails an inclosure containing the contract unsigned, accompanied by the following letter:

"Mr. J. G. Crouch, Kamilchie, Sept. 8, 1909.
"Olympia, Wash.

"Dear Sir: The Elma real estate man's time has expired now and if you have your man in view bring him down. There are some parts in the contract you left which I do not like after carefully looking it over. But that can be satisfactory after a talk with you, no doubt. If you sell the farm I want $12,000, twelve thousand (net). You may keep this letter as a contract until you come down.

"Cornelia A. Forbes."

The appellants thereupon took up the matter of the sale of the farm with certain of their clients, quoting the price of the farm at $15,000. They succeeded in interesting one Ernst Reitdorf therein, who subsequently purchased the farm directly from the respondent at the price quoted. The respondent refused to recognize the appellants' claim to a commission on the sale, and the present action was brought to recover as a commission all that the respondent received over and above the sum of $12,000. On the trial, which was had before the court sitting without a jury, the appellants put in evidence the foregoing facts, and evidence tending to show the further facts that they were the procuring cause of the sale, and it was to their customer that the farm was sold and conveyed. At the conclusion of their case, the trial judge ruled that the contract upon which the appellants

sued came within the statute of frauds, and entered a judgment dismissing the action.

The evidence, as I view the record, was sufficient to warrant a recovery on the part of the appellants. The statute thought to work an estoppel is found in Rem. & Bal. Code, § 5289, the part material to the question presented reading as follows:

"Sec. 5289. In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say; . . .

"(5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

It is urged that the formal contract, prepared at the first meeting of the parties, is not obligatory, because it is not signed by the respondent, she being the party to be charged therewith; and that the letter does not constitute a contract because it is incomplete, since it does not describe the land intended to be sold, does not set out the terms on which the property is to be sold, and does not set forth the amount of the commission the appellants were to receive for their services. These elements, it is argued, are essential to a valid contract, and unless they are set forth in the writing, the writing falls within the statute. But while I might agree with the contention that the formal writing submitted to the appellants cannot be taken as a contract since it was not signed by the respondent, and since she in her reference thereto says she is not satisfied with certain of its terms, it seems to me that it sufficiently aids the letter to make the letter a valid contract. It is manifest that by the term "farm," used in the letter, the writer refers to the property described in the formal contract. It is manifest also that the price of the farm is fixed; namely, at such sum as will net the owner $12,000. The only matter that remains un-

disclosed, in order to make the contract comply with the requirements contended for, is that it fails to state the amount of the commission to be paid the brokers for their services. But it will be observed that the statute does not directly require this to be done. Nor was the amount of the broker's charge the mischief the statute sought to remedy; the mischief under the old practice was the constant disputes arising between brokers and owners over the question whether the broker was employed to sell at all, and it was to remedy this that the lawmakers required the contract of employment to be in writing. Turning to the statute, it will be observed that this is all that the statute requires in terms to be put into the writing. It requires only that an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission, shall be in writing, signed, etc. It does not require that the rate of compensation or the amount of the commission be stated. And this being so, it cannot be essential to the validity of such a contract that these matters be stated therein. On the contrary, the contract of employment of itself implies an agreement to pay such sum as the services shall be reasonably worth, or, in this class of cases, such sum as brokers usually charge for like and similar services. I think, therefore, that the writings are sufficient to comply with the essentials of the statute, and since the amount of the commission due the appellants is not stated in the contract, they should be allowed to recover such sum as brokers usually charge for like and similar services; that is, of course, if the remainder nets the owner $12,000.

It is further argued, however, that the question here suggested is no longer an open one in this state, that this court has put a contrary construction upon the statute, holding that the amount of the commission agreed to be paid must be set forth in the writing. The cases relied upon are *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361; *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473; *Briggs v. Bounds*, 48 Wash.

579, 94 Pac. 101; *Ross v. Kaufman*, 48 Wash. 678, 94 Pac. 641, and *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103. There is much in these cases, particularly the case of *Keith v. Smith* and *Foote v. Robbins*, that lends color to this contention, but an examination of the cases will show that the precise question now presented was not before us in either of them; that while they were correctly decided on the principles involved, it was not necessary to reach the decisions that it be held that a written contract employing a broker to sell real estate on commission is void where the rate or amount of the commission is not expressed in the contract. I am compelled therefore to dissent from the conclusion reached by the majority.

DUNBAR, C. J. (dissenting)—I concur in what is said above by Judge Fullerton. It is manifest, from the whole written correspondence and from the testimony, that the parties understood each other thoroughly. The statute was enacted for a beneficent purpose, viz., to protect landowners against dishonest real estate brokers. But, unfortunately, there are also dishonest real estate owners who are quick to take advantage of real estate brokers, and the strict construction placed upon the statute by the majority in this case has enabled the landowner, the respondent in this case, to obtain the services of the appellants at her request, without compensation; and after obtaining the price which she desired for her land, by reason of the fact that she availed herself of their services, she pockets the proceeds, and coolly informs them that she will not pay them for their services because the contract was not in writing. The two written exhibits, the one signed, and the other unsigned, but plainly referred to in the written statement which is signed, convince me that an injustice has been done in this case, which was never contemplated by the law.

[No. 9448. Department One. June 16, 1911.]

MELNORA ROBERTS *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

EMINENT DOMAIN—PROPERTY SUBJECT—STATE SCHOOL LANDS. Rem. & Bal. Code, § 7768 *et seq.*, is not unconstitutional in providing for the condemnation of lands granted by the United States to the state for school purposes; since the sale of school lands is authorized by Const., art. 1, § 16, providing that the same shall not be disposed of except for the full market value.

SAME—LANDS DEVOTED TO PUBLIC USE—UNIVERSITY GROUNDS. A thirty-foot strip off the state university grounds may be condemned for a street, and it cannot be objected that it is already devoted to a public use, where there is nothing in the record to indicate that it was actually used by the university, and the record shows that the land remaining will be benefited thereby.

SAME—OBJECTIONS—STATE LAND IN USE—EASEMENTS. That state lands were already in use as a street is no objection to condemnation proceedings to acquire the same for a permanent street; since an easement cannot be acquired upon state land.

Appeal from an order of the superior court for King county, Ronald, J., entered November 18, 1910, confirming a reassessment roll for a public improvement, after a hearing before the court. Affirmed.

Bell & McNeil (*H. R. Clise* and *C. K. Poe*, of counsel), for appellants, to the point that state lands, already devoted to a public use, cannot be condemned, cited: *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *St. Louis, J. & C. R. Co. v. Trustees of Illinois Institution etc.*, 43 Ill. 303; *United States v. Certain Land in New Castle*, 165 Fed. 783; *In re Utica*, 73 Hun 256, 26 N. Y. Supp. 564; *Mayor etc. of Atlanta v. Central R. & Banking Co.*, 53 Ga. 120; *Evergreen Cemetery Ass'n v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643; *Carrol v. Vancouver*, 11 B. C. 493; *McCullough v. Board of Education of San Francisco*, 51 Cal. 418; *People v. Sanitary District of*

[1]Reported in 116 Pac. 25.

Chicago, 210 Ill. 171, 71 N. E. 334; *State v. Boone County*, 78 Neb. 271, 110 N. W. 629; *In re St. Paul & N. P. R. Co.*, 34 Minn. 227, 25 N. W. 345; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

Scott Calhoun and *Howard A. Hanson*, for respondent.

MOUNT, J.—This appeal is prosecuted from an order of the superior court of King county confirming a reassessment roll for a street improvement. It appears that, in the year 1909, the city of Seattle, under authority of an ordinance authorizing the proceedings, instituted an action to condemn certain property for the purpose of widening and improving Fifteenth avenue northeast and other streets in said city. This street extended along the west boundary of the university grounds and was only thirty feet in width. It was desired to take a strip thirty feet in width off the university grounds so as to make the street sixty feet wide. The regents of the university had some years before attempted to donate the strip sought, but it appeared that no legal dedication had been made. The street, however, had been used by the public to the full width. The state of Washington was made a party to the action, and appeared therein and consented to the adjudication. The value of the land taken was determined. Thereafter an assessment district was created, and the board of eminent domain commissioners levied an assessment on the property benefited to pay the cost of the improvement. This assessment roll was prepared and filed, objections were made thereto, and the court ordered a reassessment. Another roll was thereupon prepared and filed, and these appellants filed objections to the last roll. They also filed a motion to vacate the judgment in condemnation. When these objections were heard, the court denied the same, and also denied the motion to vacate the judgment in condemnation. The objectors have appealed from that order.

They make three contentions on this appeal, as follows: "(1) That chapter 153, Laws of 1907, p. 316 (Rem & Bal. Code, § 7768 *et seq.*), of the state of Washington, is unconstitutional, in that it provides for the condemnation of land granted to the state of Washington by the United States for school purposes; (2) that state land in actual use for a public purpose cannot be taken under a general act; (3) that the said condemnation proceedings and the assessments based thereon (in so far as they relate to Fifteenth avenue northeast) were unnecessary and unjust." It is doubtful if the objectors may raise these questions in this action, for the state was dealing with its own property, and could sell or withhold it as it deemed expedient, so long as it violated none of its trust obligations. *Aberdeen v. Wiley*, 60 Wash. 434, 111 Pac. 567. But, assuming that the objectors may raise the questions here, we shall briefly notice their contentions.

It is argued that the act in question is unconstitutional, because it provides for the taking of lands granted to the state for school purposes. Section 1 (Id., § 7768) of the act provides that certain cities are "authorized and empowered to condemn land and property, including state, county and school lands and property for streets, avenues, alleys," etc. We find no provision of the enabling act or of the constitution which provides that school lands shall not be sold. But section 1 of art. 16 of the constitution provides:

"All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state."

See, also, *State ex rel. Port Townsend v. Clausen*, 40 Wash. 95, 82 Pac. 187.

This, by inference at least, authorizes the sale of school

lands by the state. The land taken was for a public street, and it was sold at a price exceeding $10,000 per acre, which was far above the minimum price at which the state might sell such lands. The condemnation had all the elements of a public sale. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279. The statute is clearly not unconstitutional upon the points presented.

It is also argued that the land taken was already devoted to a public use—that of education, and therefore cannot be taken for another public use. There is nothing in the record to indicate that the thirty-foot strip of land in question is actually in use by the university, and there is nothing to indicate that the taking of the strip of land will impair the use of the land remaining. On the other hand, the record shows that the remaining land will be benefited. Under this condition it may be taken. *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

It is also claimed that the condemnation was unnecessary and unjust. This claim is based upon the fact that the land was actually being used as a part of the street. This use, however, could not be made the basis of a right, for no easement could be acquired upon state lands. *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188. It was, therefore, necessary for the city to acquire the property in order to make a permanent street.

We find no merit in the appeal, and the judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9274. Department One. June 17, 1911.]

WILLIAM E. DAVIDSON, *Appellant*, v. TIMES PRINTING COMPANY, *Respondent*.[1]

REWARDS—CONDITIONS OF OFFER—DECISION OF DISPUTES—CONCLUSIVENESS. Where a newspaper's advertising reward was offered upon condition that it should be the sole judge of any dispute and that its decision must be accepted as final, an action cannot be maintained by one claiming the reward, where the fact of his earning the reward was disputed, and the paper investigated the claim and rejected it, especially in the absence of fraud.

SAME—EARNING OF REWARD—FRAUD. Where a newspaper offered a reward of $500 to the person who would first arrest one whose pictures were published in the paper, the paper to be the sole judge of disputes arising or the interpretation of the rules of the contest, the paper is justified in denying the claim of one who made the arrest through information obtained by collusion with an unfaithful servant of the person sought, on the ground of unfair dealing.

DUNBAR, C. J., and GOSE, J., dissent.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 28, 1910, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action to recover an award. Affirmed.

Edward Judd, for appellant.

Bausman & Kelleher, for respondent.

MOUNT, J.—This action was brought by the plaintiff, to recover from defendant $500, being the amount of a reward offered by defendant for the capture of one Donohue under the name of "Mr. Raffles." The complaint alleged the offer and capture according to the terms of the offer, and the refusal by the defendant to pay the reward. The answer admitted the offer of reward, but denied that the capture had

[1]Reported in 116 Pac. 18.

been made by the defendant; and as an affirmative defense, the answer alleged that the plaintiff, in collusion with an employee of Mr. Donohue, learned of the residence of Mr. Donohue, and attempted to gain admission thereto, which was refused, and that plaintiff did not comply with the terms of the offer of reward but made a claim thereto; that defendant investigated plaintiff's claim, which was disputed by Mr. Donohue, and inquired into all the facts, and concluded in good faith that the plaintiff did not capture Mr. Donohue, and did not earn the reward. Upon these issues the case was tried to the court and a jury. At the conclusion of the evidence, the defendant moved the court for a directed verdict. This motion was in effect denied, and the case was submitted to the jury. A verdict was returned in favor of the plaintiff for the full amount. The court thereupon granted a judgment for defendant notwithstanding the verdict. The plaintiff appeals.

The evidence shows that the defendant company, in May, 1907, for the purpose of increasing the circulation of its newspaper, offered rewards as follows:

"Conditions of $500 Reward.

"If you think you have Raffles spotted, say to him: 'You are the mysterious Mr. Raffles of The Morning Times.' If you have the right man, he will at once admit his identity and accompany you to the Times office where you will be immediately paid the sum you have earned. Notice carefully:

"(1) $500 reward will be paid for the capture of Raffles if you can produce a receipt from the Times showing that you have subscribed and paid for the Morning and Sunday Times for six months in advance, provided such receipt is dated May 24, 1907, or later.

"(2) $300 reward will be paid for the capture of Raffles, provided you have subscribed for The Morning and Sunday Times for three months in advance under the conditions set forth above.

"(3) $200 reward will be paid for the capture of Raffles, providing you have in your hand a copy of the morning edition of The Times for the current date at the time you

make the capture, regardless of whether you are a subscriber or purchaser of any edition of The Times.

"(5) You are not entitled to any reward if you do not use exactly the words given above in capturing Mr. Raffles. 'You're Raffles!' will not bring any response, even if you have spotted the right man.

"(6) The Morning Times is sole judge of any dispute arising over the reward or the interpretation of these rules and its decision on any point connected with the Raffles contest must be accepted as final.

"(7) Pictures of Raffles will appear only in The Morning and Sunday Times."

The plaintiff, soon after this offer was made, was informed of the residence of Mr. Donohue by a person who was at that time, or formerly had been, in the employ of Mr. Donohue. This person took the plaintiff out to the place where Mr. Donohue lived and concealed the plaintiff near the house, and called Mr. Donohue out so that the plaintiff could see him. Thereupon the plaintiff went to the Times office and subscribed for the paper. He thereafter disguised himself as a plumber, and went to the house and stated that he had been sent there to repair some plumbing. He was refused admittance at the front door, but testifies that Mr. Donohue admitted him by the back way; that thereupon he placed his hands upon Mr. Donohue and said: "You are the mysterious Mr. Raffles of the Morning Times;" that thereupon Mr. Donohue ejected him from the house, and that he immediately returned to the Times office and claimed the reward; that a man was sent out with him to investigate the facts; that an investigation was made, and the payment of the reward was refused. The plaintiff read in evidence a deposition of Mr. Donohue. This deposition was taken by the defendant, but was offered in evidence by the plaintiff. Mr. Donohue in this deposition testified that the plaintiff came to the house disguised as stated, but that he refused him admission; that the plaintiff did not see him, and did

not accost him as required by the offer, and that he so reported to the defendant upon the investigation.

We are satisfied that the trial court should have directed a verdict, for two reasons: (1) The defendant had a right to attach such conditions to the offer of reward as it saw fit, and require the terms to be strictly complied with. It accordingly had a right to make itself the sole judge of any dispute arising over the reward, and provide that its decisions made in good faith should be final. 34 Cyc. 1731; 24 Am. & Eng. Ency. Law (2d ed.), 924; *Amis v. Conner*, 48 Ark. 337; *Williams v. West Chicago St. R. Co.*, 191 Ill. 610, 61 N. E. 456, 85 Am. St. 278; *Besse v. Dyer*, 9 Allen 151, 85 Am. Dec. 747. The evidence here shows that a dispute did arise between the plaintiff and Mr. Donohue over the reward. The former claimed that he had made the arrest as prescribed in the offer of reward, and the latter denied that the plaintiff had seen or accosted him as required. The defendant settled the dispute by deciding against the plaintiff after an investigation. This, it seems, is conclusive of the plaintiff's right, especially in the absence of fraud. The record in the case shows that there were some thirty claims made for the reward by persons who alleged that they had discovered the man, but upon investigation it was determined that they had not accosted the right man. This simply shows the necessity of the condition that the defendant be the judge of disputes arising upon such claims. The record also shows that subsequently the reward was claimed and paid to the rightful claimant. Furthermore, the offer was open to the public, and was intended to be conducted fairly by the contestants. The plaintiff, in collusion with an unfaithful employee of Mr. Donohue, learned of the residence of Mr. Donohue, and by such unfair means attempted to secure the reward. Even if he apprehended Mr. Donohue, under these conditions defendant would have been justified in denying plaintiff's claim, upon the ground of unfair dealing.

We are satisfied, therefore, that there was no question

under the evidence to be submitted to the jury, and the judgment is affirmed.

PARKER and FULLERTON, JJ., concur.

GOSE, J. (dissenting)—Whether the appellant captured the "Mysterious Mr. Raffles" was a question of fact to be determined by the jury. If he did, and otherwise complied with the terms of the offer, he earned the reward, and his claim could not be arbitrarily rejected. The respondent, like any other arbitrator, was required to use good faith in considering the appellant's claim. The question whether, under all the evidence, the claim was rejected in good faith was one of fact for the jury. If the reward was earned and the claim arbitrarily rejected, the appellant has a good cause of action. Nor do I think that the appellant was guilty of such collusion as to preclude a recovery. Whether he acquired the information before or after assuming the role of the detective is a question of ethics and not of law. I therefore dissent.

DUNBAR, C. J., concurs with GOSE, J.

[No. 9563. Department One. June 17, 1911.]

A. P. HOCKERSMITH *et al.*, *Respondents*, v. R. J. FERGUSON, *Appellant*.[1]

EVIDENCE — PAROL TO VARY WRITING — COLLATERAL AGREEMENT. Where a written lease appears to have been carefully prepared after consideration of many questions in regard to the property, the lessor agreeing to do nothing except deliver possession and the lessee agreeing to accept the premises as they then were and make all necessary repairs to the interior, evidence is inadmissible of an alleged oral contemporaneous agreement whereby the lessor was to make certain alterations in case of change of street grade; since it is not a collateral agreement, but was a necessary part of the letting which should have been included in the lease.

[1]Reported in 116 Pac. 11.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 23, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Reversed.

G. E. Steiner and *Walter B. Beals*, for appellant.

Brady & Rummens and *Thomas B. McMartin*, for respondents.

MOUNT, J.—Plaintiffs brought this action to recover damages to their business and stock of goods, by reason of the alleged failure of the defendant to comply with an agreement to make certain store rooms conform to the street upon which such store rooms fronted. Defendant denied the agreement. The case was tried to the court and a jury. A verdict was returned in favor of the plaintiff. The defendant appeals from the judgment entered upon the verdict.

It appears that, in the year 1905, the defendant leased lot 2, block 10, Boren & Denny's addition to Seattle, from the Cyrus F. Clapp estate, for the period of five years. Defendant thereupon erected a one-story brick building upon this lot. This building consisted of several store rooms facing upon Madison street in said city. When the building was about completed, plaintiffs entered into negotiations with the defendant to lease two of these store rooms, numbered 215 and 217 Madison street. The rental and terms of the lease were agreed upon in November, 1905, and upon the 1st of December, 1905, the plaintiffs took possession of the rooms. On the 9th day of December a written lease was entered into, as follows:

"This indenture of lease made this 9th day of December, 1905, by and between R. J. Ferguson of the city of Seattle, county of King, state of Washington, party of the first part (hereinafter called the lessor) and A. P. Hockersmith, of said city, county and state, party of the second part, (hereinafter called the lessee),

"Witnesseth: That the said lessor does by these presents

lease and demise unto the lessee that certain store room, designated and known as Nos. 215 and 217 Madison street, situated upon lots 2, in Boren & Denny's addition to the city of Seattle, for a period of two years from the first day of January, 1906, to the 31st day of December, 1907, for the rent or sum of thirty-six hundred dollars ($3,600) payable in gold coin of the United States of America in twenty-four (24) equal monthly installments amounting to one hundred and fifty dollars ($150) payable in advance on the first day of each and every month during the term of this lease. That said lessee hereby accepts said premises for the term of two years and agrees to pay therefor the sum of thirty-six hundred dollars ($3,600) said sum to be paid at the office of John Davis & Co., No. 709 Second avenue, Seattle, Washington, in the manner and at the times hereinafter specified. That said lessee agrees to pay any and all charges for heat, light and water rates, which shall become due or shall be taxed or assessed against said premises during the term of this lease, and further agrees to make all necessary repairs of whatsoever nature to the interior of said premises, and to deliver up said premises at the expiration of this lease in as good condition as they are now in, excepting the necessary wear and tear thereof and damages by the elements or fire. That said lessee, his heirs, executors, administrators or assigns shall hold harmless said lessor from all damages or accidents of every kind or nature whatsoever that may occur on said premises. That said lessee shall not use said premises for saloon or restaurant purposes, nor let or sub-let the whole or any part thereof, nor make or permit to be made any changes or alterations whatsoever without the written consent of the said lessor, or John Davis & Co., his agents, nor assign this lease or any part thereof without said written consent. That said lessee shall not use said premises for immoral or illegal purposes, nor under any circumstances permit gambling or the sale of intoxicating liquors upon said premises. It is hereby agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants or agreements herein contained, it shall be lawful for the said lessor or John Davis & Co., his agents, to reenter said premises and remove all persons therefrom. That the said lessor, or his agents, shall have the right to enter said premises at all reasonable times, and shall have the

further right to place 'For Rent' signs on said premises thirty (30) days prior to the expiration of this lease.

"In witness whereof the parties hereunto have set their hands and seals the day and year first above written."

The lease was signed, sealed, and acknowledged. After the plaintiffs had occupied the building about three months, the defendant sold and conveyed all of his interest in the property to the Cyrus F. Clapp estate, the owner of the fee, and thereafter, on April 2, 1906, the Cyrus F. Clapp estate sold and conveyed the property to Sullivan & Considine. The plaintiffs thereafter, on April 9, with notice of the sale, recorded the lease in the county auditor's office. Thereafter, in October or November of the same year, the city of Seattle, by its contractors, entered upon the street in front of the property, tore up its sidewalks, and cut away the street some eighteen feet, leaving for several months no means of ingress to or egress from the premises. The plaintiffs brought this action against the defendant for damages caused thereby, and alleged, in paragraph 6 of the complaint, the following:

"That at the time of the lease as aforesaid the said premises were desirable particularly for the purpose of plaintiffs' said business as well as valuable for other commercial purposes, the same being located at 215 and 216 Madison street in the city of Seattle, then and there a popular and valuable location in the business district of said city; then graded and improved and easily accessible to the general public; that at the said time as aforesaid there was then in contemplation a great public improvement of the city known generally and publicly as the 2d Avenue regrade, and which, if the same took place during the life of the said lease, proposed it would, by reason of the interruption and disturbance in the enjoyment of the said premises render the said leasehold of little value as was then and there mutually agreed. That at the time of making the said lease, the plaintiffs and said defendants, by reason of the uncertain condition with respect to the contemplated change of grade in said Madison street, made no provision except as aforesaid in said indenture of lease regarding the remodeling and rebuilding of the

said premises and store rooms situated therein. The said defendant landlord and these plaintiffs then and there further agreeing, by an oral, collateral contemporaneous agreement that if the said public improvement did take place during the life of the said lease, with its then agreed attendant damage, and the beneficial enjoyment of the possession be interrupted, that the said defendant R. J. Ferguson would remodel, reconstruct and repair said building as leased, by lowering the floors of the store rooms so leased, to wit eighteen feet, so as to put the same to the level of said Madison street, these plaintiffs agreeing to remove to said store rooms when said floors should have been so lowered. That by so lowering said floor, as aforesaid, the said R. J. Ferguson would be permitted thereby to create a new and additional rentable room in said building above the store rooms then to be occupied by these plaintiffs; and the said lessor then and there further agreed as a further and a part consideration, and as an inducement to enter into said lease hereinbefore described between the plaintiffs and the said defendant R. J. Ferguson, to build and construct a new entrance to the said store rooms, with an attractive glass front and with tiled flooring at the entrance, and to put in new and additional side and end windows, thereby creating said building, whence said floor had been so lowered, into an attractive and desirable store room for the use of these plaintiffs. And as a further part of said agreement, agreed to cause to be constructed a sidewalk in front of said building and premises, and otherwise to so improve the same that they would present an attractive and inviting appearance."

The complaint did not set out a copy of the lease. The defendant, when he appeared in the action, moved the court to strike this paragraph from the complaint. When this motion was denied, defendant demurred, and when the demurrer was overruled, filed an answer setting up the lease, and denied all the facts as alleged in regard to a collateral, contemporaneous, oral agreement. When the case was on trial, the defendant objected to the testimony offered in support of the allegations of the complaint as quoted above. These objections were overruled, and the plaintiffs were permitted to testify to the facts substantially as alleged in the

complaint. At the close of plaintiffs' evidence, defendant moved to strike it and for a dismissal.

The defendant contended below, and now urges here, that the facts alleged and testified to contradicted and varied the terms of the written lease and were therefore incompetent. The plaintiffs maintain that the evidence was admissible, because it tended to prove an oral, collateral, contemporaneous agreement. The rule is elementary that a written contract may not be varied or contradicted by parol. The rule is also well settled that parol evidence of collateral, oral agreements may be received where the parties have not, by their written contract, appeared to intend to reduce their entire negotiations to written form. *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465; 1 Elliott, Evidence, § 578. So that the main and controlling question here is, Was the alleged oral agreement a collateral one, or was it a part of the contract of lease. In Elliott on Evidence, § 578, it is said:

"Parol evidence of a distinct, valid, parol agreement between the parties, although prior to or contemporaneous with the written contract, is not excluded by the rule in question where it does not in any way vary or contradict the writing, and there are some cases in which this is true, although the parol agreement may be collateral to the written contract and relate in some way to the same subject-matter, at least where the writing is silent upon the subject and the parol agreement does not appear to be so closely connected with the matter of the written contract that it should be deemed to have entered into the negotiations or formed a part of the transactions or matter of which the writing was intended to be a complete and final statement. But a complete, valid, written contract merges all prior and contemporaneous negotiations and agreements within its purview, and if the parol agreement is not really collateral, but is an element of the written contract, or tends to vary or contradict the same, either in its express provisions or its legal import, it is inadmissible. The question usually is as to whether the parol evidence sought to be introduced contradicts or alters the written contract, or leaves it to stand unchanged and simply

tends to establish an additional collateral agreement. It is often difficult to determine this question, and there is much conflict among the authorities."

In the next section, 579, the same author says:

"There is also a class of cases in which it is held that oral evidence of a collateral contemporaneous agreement which assumes the contract as indicated by the writing and undertakes to deal with some contingency or new relation of the parties in the future that may arise under the written agreement, is admissible. It has also been held that parol evidence is admissible . . . to show an agreement to destroy game, rebuild or repair as collateral to a lease, and to show an agreement by a vendor or lessor not to engage in a rival or competing business. But many of these decisions are of questionable soundness, and, as shown in the next section, the weight of authority is against some of them."

And in the next section, 580, it is said:

"So, contrary to decisions referred to in the preceding section, it has been held that a prior or contemporaneous parol agreement by a vendor or lessor not to carry on a competing business is inadmissible where the written contract appears to be complete. And so the better rule is that an oral warranty of the condition of the premises or agreement on the part of the lessor to make repairs or improvements cannot be shown in such a case."

This appears to be the correct rule, and the one substantially followed by us in *Gordon v. Parke & Lacy Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *Morris v. Healy Lumber Co.*, 46 Wash. 686, 91 Pac. 186, and *Tobin v. McArthur*, 56 Wash. 523, 106 Pac. 180. It is, therefore, not necessary for us to review the numerous cases which follow or deny the rule.

It is conceded in this case that, after negotiations which led up to it, the lease in question was made. It bears upon its face evidence of careful preparation, and shows that the parties to it had considered the many questions in regard to the property; and upon the evidence introduced, it is not questioned that the parties discussed and considered the change

in the street grades and its effect upon the property. The written lease provides: "That said lessee hereby accepts said premises for the term of two years;" "that said lessee agrees to pay any and all charges for heat," "and agrees to make all necessary repairs of whatsoever nature to the interior of said premises;" "that the said lessee shall not use said premises for saloon or restaurant purposes nor let or sub-let the whole or any part thereof nor make or permit to be made any changes or alterations whatsoever without the written consent of the lessor." This appears to be a plain lease, where the lessor agreed to do nothing except to deliver possession of the premises to the lessee, who agreed to accept the premises as they then were, for a period of two years, and agreed to make all necessary repairs to the interior, and to make no changes or alterations to the building without the written consent of the lessor or his agents. Where there is no express agreement for the lessor to repair or alter the building, no such obligation will be implied. The duty devolves upon the lessee. 24 Cyc. 1081 *et seq.*; 18 Am. & Eng. Ency. Law (2d ed.), p. 226; *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956.

If there was an agreement by the lessor prior to this writing, to change or repair the building during the term of the lease, that agreement was as much a part of the contract of lease as any other, and should have been incorporated in it. It was clearly not a collateral agreement under the rule first above stated. If the agreement was made as alleged and attempted to be proved, it was a part of the contract of lease, and it is strange that so important a matter should have been left out of the written agreement. As was said by Lord Ellenborough, in *Powell v. Edmunds*, 12 East 6, at page 10:

"If the parol evidence were admissible in this case, I know of no instance where a party may not by parol testimony superadd any terms to a written agreement; which would be

setting aside all written contracts and rendering them of no effect."

The trial court therefore erred in not sustaining the defendant's objection to the evidence, and in refusing to dismiss the case upon the defendant's motion.

The judgment is therefore reversed, and the cause ordered dismissed.

DUNBAR, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9422. Department One. June 19, 1911.]

ALBA HRUBY, *Respondent*, v. C. LONSETH *et al.*, *Appellants*.[1]

BOUNDARIES—DEFICIENCY—APPORTIONMENT. The grantee, first in time, of a portion of a tract set off by metes and bounds, without references to other conveyances, is not required to yield any portion of his land to satisfy a deficiency in a subsequent overlapping grant from the common grantor; the rule of apportioning excess or deficiency having no application.

BOUNDARIES—PRACTICAL LOCATION — EVIDENCE — SUFFICIENCY. A practical location of a boundary line is not shown by mere notice that an adjoining owner made a private survey to establish the correct boundary, without proof that it was accepted or agreed to or that improvements were made with reference thereto.

APPEAL—RECORD—EXCEPTIONS TO FINDINGS. The evidence cannot be reviewed in the absence of exceptions to the findings of fact.

Appeal from a judgment of the superior court for King county, Yakey, J., entered July 16, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

Daniel Landon and *Moncrieffe Cameron*, for appellants.

John E. Ryan and *Grover E. Desmond*, for respondent.

PARKER, J.—This is an action to recover a strip of land 12½ feet wide and 100 feet long, lying contiguous to the

[1]Reported in 116 Pac. 26.

north and south boundary line of adjoining lands owned by the plaintiff and defendants respectively. The rights of the parties depend upon the proper location of the boundary line between their respective tracts. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff, and the defendants have appealed.

The findings of the trial court in favor of the respondent are very general. They are, in substance, that respondent is the owner of the land in dispute through mesne conveyance from the United States; that appellants have entered upon and wrongfully withhold possession of the land from respondent; and that appellants and their grantors have not been in possession of the land in dispute a sufficient length of time to acquire title thereto by adverse possession under either the seven or ten-year statute. We do not find in the record any exceptions to these findings, save a single general exception noted in the order denying the motion for new trial; nor are there any requests for findings of fact in any greater detail. Perhaps by reason of this we are not called upon to notice any disputed questions of fact; but since counsel for both sides devote portions of their argument to certain questions of fact, we will briefly notice some of their contentions in that regard, as well as the questions of law involved therein.

Appellants and respondent both hold title to their respective tracts through mesne conveyance from Jacob Galer, who, in 1882, owned all of government lots 5 and 6 in section 30. These lots are now in one of the residence districts of Seattle, and the particular strip of land in controversy runs north from Highland Drive 100 feet and is about midway between Fourth and Fifth avenues north. These government lots adjoin each other, extending along the north line of the section. The northeast corner of lot 5 is coincident with the north quarter corner of the section, and the northwest corner of lot 6 is coincident with the northwest corner of the section. The southwest corner of lot 5 is the starting

point of the first conveyance made by Galer of these lots. This conveyance was by deed from him to Arthur Burns, dated January 23, 1882, conveying by metes and bounds a four-acre tract, the east boundary of which was thereby fixed at 463 feet east of the west boundary of lot 5. This description is unqualified as to courses and distances. This conveyance is the source of respondent's title, under which she now owns a portion of this Burns tract along the east side thereof. Thereafter, on May 2, 1882, Galer conveyed to his daughter, Elizabeth Pratt, a certain tract of land supposed to join the Burns tract on the east, in which conveyance the description is by metes and bounds, commencing at the northeast corner of lot 5 and running south and west therefrom. This description makes no reference whatever to the Burns tract. Its courses and distances are absolute, as in the Burns deed. This is the source of appellants' title under which they own a lot in the southwest corner of the Pratt tract. These conveyances, and others following them, under which appellants and respondent claim title, apparently conflict by overlapping to the extent of the land here in controversy.

It is at once apparent that the fixing of the exact location of the southwest corner of lot 5 upon the ground will result in a ready determination of the exact location of the east boundary of the Burns tract, by measuring east from that corner the distance called for in that deed. Counsel for appellants seem to make some contention that that lot corner has not been correctly located upon the ground. It seems to us, however, the evidence shows almost beyond possibility of controversy that it is correctly located and with a great degree of exactness. It appears to have been located by the city engineering department of the city of Seattle, by measurements made strictly in accord with the rules applicable to subdividing government sections. The trial court made no special finding upon this subject, but must have concluded that such corner had been correctly located by the city, al-

though there is some evidence in the record that there had been a location made of this corner by a private survey some years previous which does not coincide exactly with that made by the city, it being some few feet farther to the west. Measuring from this corner as located by the city, it is clear that appellants are encroaching upon respondent's land 12½ feet, and that respondent's east line is located as claimed by her, and decreed by the court.

It is next contended that if there is a deficiency in the width of lot 5 measured from east to west, as seems apparent from the calls of the several descriptions in the deeds made by Galer of tracts in that lot, that such deficiency should be apportioned among the several owners holding under these deeds. We are quite unable to see that the rule of apportioning excess or deficiency between adjoining owners has any application here so far as the rights of respondent are concerned. She holds under the first deed made by Galer. That deed is given without any reference whatever to other conveyances made by him of land in lot 5. It being first in point of time, the grantee therein and his successors in interest are not required to yield any portion of their land to satisfy any subsequent grants made by Galer. This rule is too elementary to require discussion. 5 Cyc. 929. The metes and bounds description starting at a certain fixed point, and the priority of the date of the Burns deed, render the rule of apportionment invoked by counsel inapplicable to the question here involved.

It is contended that, contemporaneous with the giving of the deed from Galer to Burns in January, 1882, there was a practical location upon the ground of the east line of the Burns tract, established and agreed upon by the parties to that conveyance, and that the line so established is the same line now claimed by appellants to be the correct one. There is evidence that Galer had a survey made for the purpose of locating this line and others in lots 5 and 6. This survey we think is shown to have been made after the giving of the Burns

deed. Burns seems to have known of the making of the survey and saw the actual setting of some of the stakes, but we think the evidence is wholly deficient in showing that Burns or his grantees ever agreed to the survey as establishing the correct line. And there is nothing to show that they ever made improvements with reference to that survey. The evidence is not at all satisfactory as to just where that survey established the line, though it was apparently somewhat to the west of the line now found to be the true one. In any event, we think it was not binding on Burns or his grantees.

Some contention is made in behalf of appellants upon the ground of adverse possession. The court made specific findings against them upon this question, which were not excepted to. We think the findings are fully justified by the evidence, though as we have noticed, the question is probably not before us for want of exceptions to the findings. We discover no error in the record. The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9261. Department Two. June 22, 1911.]

FREDERICK G. LINCK, *Respondent*, v. GEORGE MATHESON *et al.*, *Appellants*.[1]

APPEAL — REVIEW — MOTION FOR NONSUIT — WAIVER. Defendants may urge their motion for nonsuit in the appellate court, although they proceeded with the trial, where it was erroneously overruled and the defect was not cured by the proofs subsequently submitted.

MASTER AND SERVANT — INJURY TO THIRD PERSONS — TORTS OF SERVANT — SCOPE OF EMPLOYMENT. An employee in a billiard room is not acting within the scope of his employment, and his masters are not liable for his acts, where he made an assault upon a customer for personal reasons and ill will, the customer having been given permission to play by the proprietors, and no duty devolving upon the employee as such to which the assault in any manner related.

[1]Reported in 116 Pac. 282.

Appeal from a judgment of the superior court for King county, Gay, J., entered August 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for injuries inflicted by defendants' servants. Reversed.

Howard Waterman (*Walter S. Fulton*, of counsel), for appellants.

Welch & Crotty (*A. G. McBride*, of counsel), for respondent.

Crow, J.—Action by Frederick G. Linck against George Matheson and Thomas Deady, to recover damages for personal injuries inflicted by defendants' servants. From a judgment in plaintiff's favor, the defendants have appealed.

Appellants, as partners, own and conduct a saloon and pool room in the city of Seattle, known as the Victor Bar. Respondent alleged that, on March 13, 1909, while he was playing a game of pool in appellants' place of business, one James Deady, their employee, struck him to the floor with a billiard cue and kicked him while he was in an unconscious condition. Appellants denied these allegations, and introduced evidence tending to show respondent was not struck or injured in their place. Numerous assignments of error are presented, some of which would be sufficient to require a reversal and new trial. We will, however, consider only appellants' contention that the trial court erred in denying their motion for a nonsuit. We find that, at the time the motion was interposed and denied, the proofs were not sufficient to sustain a verdict in respondent's favor; that the defects in his case were not cured by evidence subsequently admitted; and that appellants are now entitled to, and do on this appeal, urge their motion for a nonsuit, which on the record has not been waived. *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471. Respondent's evidence was that, immediately after he came into

the pool room, he commenced playing a game with one Clementson; whereupon James Deady, appellants' employee, without provocation or previous altercation, struck him with a billiard cue. He testified as follows:

"Q. Now, you just started to play when Jim Deady came over and struck you? A. I told you I was knocked down by Jim Deady, yes. Q. He just came right over and struck you? A. Yes, struck me. Q. As you were playing? A. As I started to play. Q. Now, did he say anything before he struck you? A. He did not. Q. Had you said anything to him? A. Not then, no, sir. Q. You had simply gone in there and walked up to a pool table and started in to play with Clementson, and as you started to play, James Deady came immediately over and struck you with the pool stick? A. He did. Q. Knocked you down? A. He did."

He further testified that, on Saturday, just one week before, he was playing pool in appellants' place, when some question arose between him and James Deady relative to payment for a game; that James Deady then said he could play no more; that he started a new game, whereupon James Deady made a rush at him with a billiard cue; that respondent picked up a billiard ball to hit James Deady, who thereupon desisted; that George Matheson, one of the appellants, stepped in, asked about the trouble, told respondent he could continue playing, but must pay for his games, and that he then played another game. After stating this incident, respondent further said:

"That is the reason this Jim Deady had it in for me the time I went in there the next Saturday evening. I guess that is the reason he hit me with the billiard cue."

It will thus be seen that respondent himself testified to these facts within his knowledge, as the basis of his alleged cause of action against the appellants, whom he seeks to hold for the tortious acts of their employee. His statements show he was assaulted by James Deady maliciously, for personal reasons and ill will, and that the latter, although ap-

pellants' servant, was acting without the scope of his authority. There was at the time no dispute as to the conduct of, or payment for, any game. Appellant Matheson had given respondent permission to play pool at appellants' tables. No dispute, difference, or exchange of words occurred at the time of the assault or immediately prior thereto. There was no duty devolving upon James Deady, as appellants' employee, to which the assault in any manner related. In *Everingham v. Chicago etc. R. Co.* (Iowa), 127 N. W. 1009, the supreme court of Iowa said:

"It is fundamental that a master is not liable for all assaults made by his servant. It is only for such as are done in the prosecution of the master's business that the master is liable. If the servant steps aside from his master's business and, in order to effect some purpose of his own, commits an assault, the master is not liable."

It appears that James Deady stepped aside from the prosecution of appellants' business and committed the assault for the wrongful purpose of gratifying his own hatred and ill will. He would be liable, but the appellants as his employers are not. In *Chase v. Knabel*, 46 Wash. 484, 90 Pac. 642, 12 L. R. A. (N. S.) 1155, the plaintiff sought damages from the proprietor of a restaurant for injuries inflicted by his waiters. An issue arose as to whether the waiters were ejecting plaintiff from the restaurant for insulting a lady customer, or were actuated by their own motives of ill will. Commenting on the defendant's liability, we said:

"The question for the jury to decide, under the first cause of action alleged, was as to whether this assault upon plaintiff was made by these waiters within the scope of their duty as such, or whether it was by reason of a personal difficulty, ill will, or ill feelings existing between the plaintiff and the waiter or waiters themselves, independent of their functions as servants of appellant. It is doubtless the duty of a restaurant keeper to accord protection to lady patrons from insult or annoyances while they are in his restaurant. If such a lady customer is insulted or annoyed, it is doubtless

the duty of the proprietor or his waiters or servants to put a stop to such annoyance and, if necessary, to eject the person guilty of the offense; and in so doing they may use all necessary force, being liable, however, in damages for injuries occasioned by the use of unnecessary force and violence. On the other hand, if the assault and battery made upon plaintiff was occasioned by reason of ill will, jealousy, hatred, or other ill feeling on the part of the waiter or waiters, independent of their duty as agents of the proprietor toward the lady in question, then the proprietor would not be holden in damages."

In this case it unquestionably appears from respondent's statement that, without any immediate provocation or previous words, James Deady made the assault because he "had it in for him." In other words, the attack was induced by ill will, hatred, or other ill feeling entertained by James Deady towards respondent, irrespective of his duties as an employee of appellants.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

[No. 9424. Department Two. June 22, 1911.]

EDLA POLAND, *Respondent*, v. C. G. POLAND, *Appellant*.[1]

DIVORCE—DECREE FOR ALIMONY — ENFORCEMENT — PROCEEDINGS — PARTIES—CONTEMPT. A show cause order to enforce a decree for alimony is properly entitled in the divorce case, as the same is an equitable proceeding in aid of the court's original jurisdiction, and not a contempt proceeding to be prosecuted as a criminal case in the name of the state, under Rem. & Bal. Code, § 1054; although the order was to show cause or be adjudged in contempt.

SAME—JURISDICTION. The jurisdiction of the court in a divorce case to enforce the payment of alimony awarded for the support of children is a continuing one, without the necessity of another action to collect payments past due.

[1]Reported in 116 Pac. 2.

Appeal from an order of the superior court for King county, Ronald, J., entered October 17, 1910, upon findings in favor of the plaintiff, decreeing the payment of alimony awarded by a decree of divorce, after a hearing before the court. Affirmed.

Faben & Kelleran, for appellant.

Roney & Loveless, for respondent.

Morris, J.—Prior to October 13, 1903, the parties hereto were husband and wife. On that day a decree of divorce was entered, dissolving the marriage relation and awarding to respondent $40 per month for the support and maintenance of the three minor children of the parties. These payments were made regularly until January, 1905, since which time payment has only been made at intervals, leaving a balance now due of at least $1,400, the true amount due being dependent upon the value of certain disputed credits not necessary to be here determined. On June 20, 1910, the court below entered an order herein in the original case, upon motion of respondent, requiring the appellant to show cause, upon the return thereof, why he should not be required to pay the sum then claimed to be due under the decree. He appeared in response to this order, attacking the jurisdiction of the court, in which he was overruled; then asking that the decree be modified so as to eliminate therefrom the provision regarding the monthly payment, and that he be discharged from the payment of all claimed arrears. This motion being denied by the court, a hearing was had upon affidavits, the court entering an order October 17, 1910, requiring the appellant to pay $300 of the arrears within thirty days, and to continue the $40 monthly payment provided for in the original decree. The appeal is from this order.

We shall not refer to the findings as made by the court below. They are abundantly sustained by the record and will stand as the findings of this court. The sum of $300 was de-

termined by the court below as the proper amount to be now paid upon the back payments, on account of that sum being required for necessary medical and surgical aid to two of the children. The jurisdictional attack is made upon two grounds, it being first contended that, as the show-cause order of June 20 required the respondent to appear or be adjudged in contempt, it was a contempt proceeding, and as such should have been brought in the name of the state, under Rem. & Bal. Code, § 1054, providing that:

"In the proceeding for a contempt, the state is the plaintiff . . . and in all cases where the proceeding is commenced upon the relation of a private party, such party shall be deemed a coplaintiff with the state."

This is not a contempt proceeding. Under our statute a proceeding in contempt is in the nature of a criminal proceeding, in which the only matter to be inquired into is the contemptuous act charged. This is a proceeding in a court of equity in aid of its original jurisdiction, in which the court is seeking the enforcement of its original decree; and although the court required the respondent to appear in response to its order or be adjudged in contempt, the nature of the proceeding was not changed from one of equitable to one of criminal cognizance. It has long been the established practice in this state, in seeking the enforcement of alimony decrees, to entitle the proceeding in the original action, and such practice has been recognized in this court in *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, and *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535. Such also is the rule in other states. *Lyon v. Lyon*, 21 Conn. 185; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817. Had the respondent failed to appear and the court desired to move against him for his refusal, it would have been the commencement of a new proceeding, and, as such, brought under the contempt statute. But so long as the only question before the court involves the construction and enforcement of its original decree, it was an equitable

proceeding, properly brought under the original proceeding and properly entitled therein.

It is next contended that the proceeding was irregular. Being an attempt to enforce a liability for the payment of alimony arrears, it was an attempt to enforce a substantive cause of action against respondent, and as such could only be instituted and enforced as any other cause of action. Counsel cites no authority for this contention, and we know of none. The jurisdiction of the court in divorce cases, where alimony is awarded for the support of children, is a continuing one, and the jurisdiction of both the parties and the subject-matter continues so long as there is a minor child whose welfare and maintenance are provided for in the decree.

The other matters complained of arise out of exceptions to the court's findings of fact which, as we have before stated, we find to be abundantly sustained by the record, and they will not be disturbed.

The order appealed from is affirmed.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9528. Department Two. June 22, 1911.]

H. G. YOUNG, *Appellant*, v. ALOHA LUMBER COMPANY, *Respondent*.[1]

MASTER AND SERVANT—NEGLIGENCE—GUARDING MACHINERY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action by an inexperienced man, whose hand was cut while doing his first work on a ripsaw, the negligence of the master and the contributory negligence of the servant is for the jury, and it is error to grant a nonsuit, where it appears that, while the plaintiff was pushing a board through the saw with a stick as directed, the foreman withdrew his attention by suddenly touching him on the shoulder and directing him to work faster, whereupon his hand was cut by the saw in an unexplained manner, there being evidence by an expert that the guard on the saw was only sufficient to pro-

[1]Reported in 116 Pac. 4.

tect against spalts or flying pieces, and that it was practicable to guard the saw with an adjustable hood which would have made the accident impossible.

SAME — GUARDING MACHINERY — ASSUMPTION OF RISKS. An employee does not assume the risks of working on a saw which was not properly guarded, as required by the factory act, from the fact that he was properly instructed.

TRIAL—MOTION FOR NONSUIT—HEARSAY—INFERENCES. Upon motion for a nonsuit, the court must consider all justifiable inferences from the evidence that are favorable to the plaintiff.

MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT. The fact that an injured employee cannot fully explain how an involuntary accident happened does not preclude a recovery.

MASTER AND SERVANT—NEGLIGENCE—GUARDING MACHINERY—QUESTION OF LAW. Where the uncontradicted evidence shows that an accident could not have happened if a saw had been properly guarded, and that a reasonably safe guard would not have interfered with its efficient operation, the master is chargeable with negligence as a matter of law.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered November 12, 1910, granting a nonsuit in an action for personal injuries sustained by an employee in a sawmill. Reversed.

Dan Pearsall and *A. Emerson Cross*, for appellant.

Morgan & Brewer, for respondent.

ELLIS, J.—This is an action brought under the factory act for damages for personal injury, claimed to have been received by the appellant from an insufficiently guarded ripsaw in respondent's mill. It appears from the evidence that, on or about February 1, 1910, appellant was engaged, through an employment agency at Aberdeen, to work in the respondent's mill yard at Aloha, Washington; and on the 2d or 3d of February, 1910, when he presented himself for work, he was informed by the respondent's manager, a Mr. Dole, that there was then no work for him in the yard, but that he desired appellant to work at a certain ripsaw in the mill. The manager inquired of appellant whether he was familiar with

the operation of such a saw, and was informed by appellant that he was not. The manager then took appellant to the ripsaw, and demonstrated the operation of sawing by starting a board with his hand and then shoving it through the saw with a stick. Appellant had never worked in a sawmill before, and knew nothing of the operation of saws, but had run stationary and donkey engines for some time. He testified that he at once began work, operating as he had been directed by the manager, first starting the board with his hand, and then shoving it through with a stick about fifteen inches long; that he had worked about an hour and a half, when the mill foreman came up and, putting his hand on the appellant's left shoulder, hallooed at him "that this piece work has to be done fast." Appellant's testimony as to how he was injured is as follows:

"Q. What did you do? A. I turned around and looked in —turned around and looked at his face. Q. What position were your hands? A. They were right in front of the saw, possibly a foot. Q. What did you have in your hands, if anything? A. I had a stick. Q. What were you doing with this stick at the time, Mr. Young? A. I was starting to shove the board through the saw. Q. Had this board gone all the way through the saw at the time, at the time that you turned around to see the foreman? A. No, sir. Q. Do you recall which shoulder he hit you on? A. I think it was my left shoulder. Q. Which way did you turn, to the left or to the right? A. To the left. Q. Which hand—which was forward on this stick, your left or right hand? A. My left hand. Q. Did you have anything on your hand? A. On the stick?

After being questioned concerning a glove which was on his hand at the time, his examination continued:

"Q. What did you do—how did you know that your hand was in the saw? A. Because I felt like there was an electric shock running through my arm. Q. What did you do when you felt this shock that you speak of? A. I looked at my hand. Q. And in what condition did you find it in? A. It was very bloody at that time. Q. As to its condition, as to

whether or not it was all there or not? A. It was not all there. Q. What part was gone, if any? A. That finger. Q. Where was the portion of that finger or did you know where that portion of that finger was? A. It laid on the front of the table. Q. Were any other fingers or any other portion of your hand cut at the same time? A. Yes, sir. Q. Tell the court and jury what portion of your hand and fingers were cut. A. This middle finger was cut in two and this part here was cut half through and the joint and thumb split up."

Appellant further testified that he did not attempt to brush spalts or splinters away from the saw with his hand, and that he did not get injured in that manner.

The saw was guarded by a board along the right side and another about three inches wide over the top of the saw, at right angles to the first board and about three inches above the saw. The saw projected, appellant says, more than two and a quarter inches through the table on which the boards were placed for sawing. The front of the saw and the left side above the table were exposed to the operator. A picture, introduced in evidence by respondent on cross-examination of the appellant, shows a piece of leather, or covering of some kind, over a part of the front of the saw, but appellant said he did not remember seeing it there at the time of the accident.

One J. S. Coxey, called as an expert for appellant, testified that in years past he had worked in sawmills for about five years in all; that he had had about three years' experience with table saws like a ripsaw or resaw; that he had made guards for several ripsaws and had seen several made by other people; that he was acquainted with the operation of ripsaws and resaws; that he had been in recent years engaged in various lines of business and employment, and at times in inventing sundry devices, among them models for guards for wood working machines. The trial court holding him sufficiently qualified as an expert, he testified that the guard above described would be reasonably safe to guard

against spalts or anything thrown against the operator's body or face by the saw, but not as a protection for the hands. Being asked what in his opinion would be a reasonably safe guard for a ripsaw, having due regard to the uses for which it is intended and the efficiency of its operation, he testified, in effect, that a reasonably safe guard for such a saw would be an adjustable hood, suspended on a screw or bolt over the saw, in such a way that it could be raised or lowered according to the thickness of the boards to be sawed, thus protecting the operator from injury at every point except the space through which the boards would pass; that such a guard would not interfere with the operation of the saw in the least, and that, if such a guard had been used, it would have been impossible for the appellant to be injured. He further testified that he had had such a guard of his own some twelve years ago, and had seen one in use on a ripsaw or resaw the day before the trial, in the Aberdeen Manufacturing Company's plant at Aberdeen.

Such is the substance of appellant's evidence. At its close, respondent moved for a nonsuit, challenging its sufficiency on various grounds. The court, in sustaining the motion, said:

"Now, gentlemen, I think I will have to sustain the motion. There is no evidence showing just how this man did get his hand hurt. The only way that I can gather from the evidence that he did get it hurt was that he says that he had his hand on the board that was going through the saw, the left hand, and the foreman touched him on the shoulder to attract his attention and that when he was looking at the foreman, in speaking to the foreman, he felt his hand hurt. Now, it seems evident to me, gentlemen, that he simply held his hand on the board, as it passed through into the saw, too long; it slipped into the saw, his finger, before he was aware of it. Any guard that might have been on there that would permit a board to run through there would have allowed the same thing. Anything, any guard, would have allowed his hand to go in there the same way, and, for that reason, that it could not have been owing to the guard, because any guard that could have been placed there that would have allowed the saw to

operate would have allowed his hand to go under the guard. It was simply one of those accidents that would have occurred from his inattention. If he had stopped and took his hand off while he allowed the foreman to speak to him he would have not been hurt. As I see it, any guard that could have been placed there could not have prevented his hand from slipping into the saw when he had hold of the board, which was evidently the way he was hurt. The evidence shows that he was properly instructed as far as that is concerned, and shows that he was not experienced in the use of saws, but also shows that he was an experienced man and had been around machines and had run donkey engines for some time, so that his education in that way would have been sufficient for him to understand the ordinary risks of handling and working with a saw."

The formal judgment of dismissal recites that the motion was sustained "for the reason that there was no evidence showing just how the plaintiff got his hand hurt, and that it was not owing to the absence of a reasonable safe guard that plaintiff was injured." It is evident from the court's remarks that he based his decision largely upon the assumption that appellant was guilty of contributory negligence by placing his hand upon the board and allowing it to follow the board into the saw. This assumption is not only not supported by any evidence, but is contrary to the evidence. Appellant, who was the only person who testified as to the accident, said that he had his hand upon the stick pushing the board, and there was no evidence that he had his hand upon the board at the time of the injury. The court may not have believed the witness, but as there was nothing inherently incredible in his statement, its credibility was for the jury.

The court seems, also, to have held that appellant assumed all the risks of working at the saw, because he had been properly instructed and knew something of machinery. This was not ground for a nonsuit, if, in fact, the guard in use was not a reasonably safe one and a reasonably safe guard was practicable, and if, in fact, the appellant would not have been injured had a reasonably safe guard been used. These were

questions for the jury. *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Noren v. Larson Lumber Co.*, 46 Wash. 241, 89 Pac. 563; *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588; *Campbell v. Wheelihan-Weidauer Co.*, 45 Wash. 675, 89 Pac. 161; *Rector v. Bryant Lumber & Shingle Mill Co.*, 41 Wash. 556, 84 Pac. 7; *Vosberg v. Michigan Lumber Co.*, 45 Wash. 670, 89 Pac. 168; *Johnson v. Far West Lumber Co.*, 47 Wash. 492, 92 Pac. 274; *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3. Whether assumption of risk could have been invoked successfully as a defense was dependent upon evidence as to whether the respondent had made a *bona fide* effort to protect the operator with a guard commonly in use for the purpose, and whether such an accident could reasonably have been anticipated by the respondent, and upon the knowledge and experience of the appellant. These are all matters of defense. *Johnston v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627.

Nor do we think the granting of the nonsuit warranted on the ground that the evidence failed to show "just how plaintiff got his hand hurt." Upon challenge to the sufficiency of uncontradicted evidence, by motion for nonsuit, it is the duty of the court to consider, not alone the literal statements, but all of the justifiable inferences therefrom favorable to the plaintiff. *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38, 29 Pac. 942; *Johnson v. Southern R. Co.*, 122 N. C. 955, 29 S. E. 784; *Shay v. Richmond & Lancaster Turnpike Road Co.*, 64 Ky. 108; *Hanley v. California Bridge & Constr. Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; *Volosko v. Interurban St. R. Co.*, 113 App. Div. 747, 99 N. Y. Supp. 484; *McCabe v. Montana Cent. R. Co.*, 30 Mont. 323, 76 Pac. 701; *Lee v. Publishers, George Knapp Co.*, 137 Mo. 385, 38 S. W. 1107.

There are only three ways suggested in the briefs or in argument in which it was possible for the accident to have happened; either by appellant placing his hand upon the board and allowing it in that way to pass into the saw, or by

his attempting with his hand to remove spalts or splinters from near the saw, or by his hand coming in contact with the unguarded front of the saw when, being touched and loudly accosted by the foreman, he turned suddenly to the left. The first two of these are negatived by the evidence. The almost necessary inference, therefore, is that the accident happened in the third way. In fact, that is the fair import of his evidence, even without eliminating other possible ways, though appellant did not actually see, and hence did not say, just how his hand got hurt. There was no such element of mystery in this case as is found in *Dahlstrom v. Inland Box & Mfg. Co.*, 61 Wash. 325, 112 Pac. 345. In that case the claim that the saw was insufficiently guarded was abandoned on the appeal. In *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, the plaintiff was alone at the time of the accident. He testified that he did not know how it happened, and made no effort to explain any of the circumstances. That case is not controlling on the facts here presented. It was decided before the factory act was passed. There was no evidence from which it could be inferred that any negligence of the defendant caused the injury. When, from all the circumstances developed by the evidence, it becomes reasonably apparent that the injury occurred because of an insufficient guard, then, in the absence of contradictory evidence, a nonsuit should not be granted for lack of direct evidence showing just how it occurred. There is no valid reason why the same rule should not apply in such a case as in cases where the master has failed to instruct the operator and warn him of the danger.

"Where the contact is involuntary or accidental, the (in)-ability of the party to fully explain how the accident happened should not be deemed conclusive against him." *Von Postel v. Lake Sammamish Shingle Co.*, 51 Wash. 261, 98 Pac. 665.

See, also, *Wikstrom v. Preston Mill Co.*, 48 Wash. 164, 93 Pac. 213.

We think the court also erred in holding that there was no evidence that it was owing to the absence of a reasonably safe guard that the appellant was injured. All other suggested causes were eliminated. There was evidence tending to show that the accident could not have happened had a reasonably efficient guard been used. There was also evidence that such a guard as that used was not reasonably safe, and that a reasonably safe guard could have been used without in the least interfering with the efficient operation of the saw. In such a case, in the absence of any evidence to the contrary, a defendant is chargeable with negligence as a matter of law. *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102; *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3; *Vosberg v. Michigan Lumber Co.*, 45 Wash. 670, 89 Pac. 168; *Adams v. Peterman Mfg. Co.*, 47 Wash. 484, 92 Pac. 339; *Newcomb v. Puget Sound etc. Boiler Works*, 54 Wash. 419, 103 Pac. 456; *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 111 Am. St. 1006; *Rector v. Bryant Lumber etc. Co.*, 41 Wash. 556, 84 Pac. 7; *Benner v. Wallace Lumber & Mfg. Co.*, 55 Wash. 679, 105 Pac. 145.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9493. Department Two. June 23, 1911.]

KNEELAND INVESTMENT COMPANY, *Respondent*, v. BYRON L. ALDRICH *et al.*, *Appellants*.[1]

LANDLORD AND TENANT—RENT—PERSONS ENTITLED. A transfer of the reversion of leased premises does not carry the right to accrued rents, where they are not mentioned in the deed.

LANDLORD AND TENANT—LEASE—RENT—TIME FOR PAYMENT—ESTOPPEL—UNLAWFUL DETAINER. Where a lease for one year at a monthly rental "payable monthly in advance," was executed on the 11th of the month and possession taken on the 15th and rent was paid for the last half of the first month, and thereafter was demanded and paid in advance on the first day of each calendar month for several months without question, the lease will be construed as calling for payments on the first of each calendar month, and the lessee is estopped to assert that notice in unlawful detainer on the 7th, not objected to at the time, was premature; especially where at the trial no issue as to the time of payment or sufficiency of notice was raised by the pleadings, evidence, or requests for findings.

LANDLORD AND TENANT—UNLAWFUL DETAINER—RENT—DEFAULT—EXCUSE FOR NONPAYMENT. Where a lease of a hotel provided for the retention of specified rooms until vacated by the present occupant, in which event the lessee was to be given possession of the rooms, upon surrendering to the lessor certain other rooms in lieu thereof, the lessee must demand possession and offer to surrender the other rooms in exchange in order to evade eviction for nonpayment of rent; and a mere inquiry of a clerk of the lessor as to when possession would be given is not a sufficient demand.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 28, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for unlawful detainer. Modified.

H. F. Norris and *T. W. Hammond*, for appellants.

G. C. Israel, *Frank C. Owings*, and *Thos. L. O'Leary*, for respondent.

[1]Reported in 116 Pac. 264.

ELLIS, J.—Action for unlawful detainer of leased premises and for unpaid rent. It appears from the record that on February 11, 1910, W. H. Kneeland and wife, by written lease, let certain parts of the Kneeland Hotel building, in Olympia, Washington, to appellants and one J. F. Fuhrman, for a period of one year from February 15, 1910. The lease consists of two separate instruments executed at the same time, both in duplicate, one being the lease proper, and the other a memorandum of agreement relative to heat and janitor service to be furnished by tenants for parts of the building not leased to them, and other matters which will be noted hereinafter. The appellants went into possession under the lease on the 15th day of February, 1910. The lease proper contains the following provision:

"The party of the second part is to have and to hold this property for the uses and purposes of the conduct of a first class hotel and for no other purposes, for the period of one year at the monthly rental of $192 per month, payable monthly in advance, with the further understanding and agreement that the rent of the last three months of the terms for which they lease is made to wit: The sum of $576 is paid in advance and the paying of the $576 shall not in any way affect the monthly payments of rent as herein above provided for, until all the rent provided for in this lease has been paid excepting the last three months."

The memorandum of agreement contained the following:

"It is further understood and agreed between W. H. Kneeland the party of the first part and Lillie B. Aldrich, J. F. Fuhrman and Byron Aldrich, parties of the second part, that the United States Government may continue to use the suite of rooms now being used by them on the fourth floor of the said Kneeland Hotel as long as they wish to, and that the said W. H. Kneeland shall have the rent therefor, and in lieu thereof the said Lillie B. Aldrich, J. F. Fuhrman and Byron Aldrich shall have the number of rooms number eighteen, nineteen, twenty on the second floor without additional rent, but when the United States Government shall vacate the rooms above mentioned on the fourth floor, the right to use the said rooms shall revert to the said Lillie B. Aldrich

and F. J. Fuhrman and Byron Aldrich and that they shall vacate and turn over to the said W. H. Kneeland or his representatives rooms number 18, 19 & 20."

These provisions are the only parts of the lease and memorandum directly pertinent to the matters involved in this appeal.

The rent for the last half of February and for the months of March and April has been paid. Of the rent for May, $100 was paid, leaving an unpaid balance of $92 for that month. The April rent was paid in advance on the first day of that month. On May 16, 1910, W. H. Kneeland and wife conveyed the leased premises to the respondent, Kneeland Investment Company. George W. Draham, the president and manager of the Kneeland Investment Company, on the 1st day of June, presented to Mrs. Aldrich, who it is admitted was the principal manager of the hotel for the appellants, a bill for the balance of the May rent and for the rent for the month of June. He testified that he presented this bill to her in person and demanded payment at that time; that she said she could not pay it all, but offered to pay $40 or $50 thereon; that Draham then told her it was all due and he expected it all; that she finally agreed to go to Tacoma and get the money, and that she would return on the 2d and pay the bill; that he told her he would not then be there, and she said without fail she would pay it to Miss Algier, who it appears was stenographer and bookkeeper for the respondent; that Mrs. Aldrich failed to pay the bill, and Draham finally gave it to respondent's attorney for collection. He further testified that no rent has since been paid. Mrs. Byron L. Aldrich, who testified as a witness for appellants, immediately following Draham, did not in any way contradict his testimony as to the time of these payments and demands for payment, nor was his testimony contradicted in this particular by any witness. She did not controvert her then acquiescence in his claim that the rent fell due on the first of the month.

On June 7, 1910, the respondent corporation, claiming that the appellants owed it $284, being $92 balance of May rent, and $192 June rent, served a notice upon them to pay this rent or quit. This notice remaining uncomplied with as to either alternative for three days, this action was begun. After trial, the court, on the 27th of September, 1910, made findings of fact and conclusions of law, and entered against the appellants and in favor of respondent a judgment of ouster, and for rent in the sum of $860, with interest at the legal rate on $92 from May 1st, 1910, and on $192 from June 1st, 1910, and on $192 from July 1st, 1910, and on $192 from August 1st, 1910, and on $192 from September 1st, 1910, and for costs, from which judgment this appeal was taken.

The first contention of the appellants is that the notice to quit or pay rent was premature, and that no rent was due the respondent on June 7, 1910, when the notice was served. This contention is based as to the $92 unpaid balance of rent for May, upon the fact that that sum was already due to W. H. Kneeland before the conveyance of the leased property to the respondent on May 16, 1910. As to this part of their contention, the appellants are correct. The deed to the respondent did not mention rents already due. The transfer of the reversion did not carry to respondent the rents already accrued, but only those subsequently accruing. 24 Cyc. 1173; *Kennedy v. Kennedy*, 66 Ill. 190; *Burden v. Thayer*, 3 Met. (Mass.) 76.

The rent for the month of June presents a question more difficult of solution. The appellants claim that since the lease provided that the rent was payable monthly in advance, and was dated February 11th, therefore, the rent was payable on June 11th for the month ending July 11th, and was not due when the notice was given on June 7th. The lease is not clear on this point. While it says the rent shall be payable monthly in advance, it does not contain the provision usual in such cases "monthly in advance on the first day of

each month," nor does it fix any other date for the beginning of the month for the purpose of payment, except as it might be inferred from the date of the lease, February 11th, or from the date of the commencement of the term, February 15th. It is, however, manifest from the record that the parties themselves construed the lease by their words and conduct as requiring payment to be made on the first day of each calendar month. In every instance of which we find any evidence as to the time of payment or of demand for payment, such payment was demanded on the first day of the calendar month, and in no instance was there any claim made by the appellants that such demand was premature. There is no evidence that any rent was ever paid or demanded on the 11th of any month. The receipt for the April rent, which appellants introduced in evidence, shows that the April rent was paid on April 1st. When the rent for June was demanded, Mrs. Aldrich made no protest or objection that it was not then due, merely stating that she did not then have the money, but offered to pay a part, and when this was refused, promised without fail to procure the money and pay it all on the following day. If all parties had not then clearly understood that the rent was payable on the first day of each calendar month, she would doubtless have refused to pay it, and insisted upon the additional eleven or fifteen days in which to raise the money. Neither of the appellants intimates that they, or either of them, ever questioned the right of respondent to demand rent in advance for each calendar month on the first day of such month.

Moreover, there is serious question as to whether this issue was intended to be raised by the pleadings. That the real issue sought to be raised by the answer was the contention that no rent was due because appellants had never been placed in possession of rooms which had been occupied by the United States Land Office, is apparent from the fact that the action was actually commenced by service of summons on June 14, 1910, after the time when they now contend the

rent for June became due: namely, June 11th, yet the answer alleges that no rent was due at the time of answer. At any rate, the case was evidently tried upon that theory, since the evidence of demand for the June rent on the first day of June was not objected to in any manner. It is, of course, the law that where a lease provides for payment of monthly rental, but fixes no time of the month for payment, the rent is due at the end of each month. But in such a case evidence of the conduct of the parties has been held admissible to show that they have construed the lease as requiring payment in advance on the first day of each month. *Ellis v. Rice*, 195 Pa. St. 42, 45 Atl. 655. Also, where a lease contained no stipulation as to when rent was payable, an agreement to pay quarterly was inferred from the fact that the lessor demanded it quarterly, and the tenant frequently had paid it so. *Long Island R. Co. v. Marquand*, 6 New York Legal Observer 160.

Inasmuch as the lease here in question does not name a specific day for the monthly payment, and the parties themselves have treated it as requiring payment monthly in advance on the first day of each calendar month, we think the appellants should be estopped to claim otherwise. Even if respondent was mistaken in making the demand for rent on the first of the month, it would be a manifest injustice now to allow the appellants to raise that objection, when they were absolutely silent at the time and, so far as the record shows, made no such definite contention at the trial. In all of the nineteen requests for findings filed by the appellants, not one asked the court to make any specific finding on this point or to construe the lease in this particular.

The appellants next claim that no rent was due, because they were not put in possession of the rooms vacated by the United States government, as provided in the memorandum of agreement hereinbefore quoted. These rooms were vacated by the government some time in the latter part of May, 1910, the exact date not being fixed by the evidence. It is urged that, since the consideration for the covenant of the

appellants to pay rent was the use of the premises, and the lessor wrongfully deprived them of this part of the premises, the consideration failed and the obligation ceased. It is true, as a general rule, that a wrongful eviction or deprivation of the tenant by the landlord of a substantial part of the demised premises discharged the tenant from the payment of the whole rent until the possession is restored, as announced in Taylor's Landlord & Tenant (9th ed.), § 378, and other authorities cited by appellants. But in this case the evidence fails to bring the parties within the rule. The evidence on this point is conflicting. It does not fairly show that the appellants ever made a demand for these rooms or ever offered to surrender the rooms which they held in lieu thereof. Mrs. Aldrich testified that she requested possession of these rooms from Miss Algier about the latter part of May when they were vacated by the government, and that Miss Algier answered that she had spoken to Mr. Draham about the rooms, that she did not know what he was going to do, and she would see him again. Mrs. Aldrich further testified that she at no time had any conversation with any one else representing the respondent in regard to this matter. The evidence shows that she saw Mr. Draham, the president and manager of respondent company, shortly after the rooms were vacated, but she does not claim to have said anything to him about the rooms when he demanded the June rent. She claims to have spoken to Miss Algier at other times, but this is contradicted by Miss Algier. We think the decided preponderance of the evidence shows that nothing amounting to a demand for possession of these rooms or an offer to surrender the rooms held in lieu of them was ever made. This defense must fail for lack of proof.

Finally, the appellants insist that the court erred in rendering judgment for $860, while the court's finding was that: ". . . there is now due and owing to this plaintiff the sum of two hundred and eighty-four ($284) dollars." The conclusions of law, however, contain a direction for

judgment for the full amount, and itemized as in the judgment rendered. It is not pretended that the appellants did not retain possession up to the time of trial on September 27th, 1910, nor is there any pretense that they have paid any rent since the payment of $100 on the rent for May, 1910. The evidence is uncontradicted that they have paid no rent since that time. The judgment is therefore amply supported by the evidence, except as to the $92 balance of the rent for May, which was due to Kneeland and not to respondent. The prayer of the complaint contains the following:

"Second: For a judgment in money of two hundred and eighty-four ($284) dollars with interest at 6% per annum on the sum of ninety-two ($92) dollars from the first day of May A. D. 1910, and interest at the rate of 6% per annum on $192 from the first day of June A. D. 1910, and for rent at the rate of $192 per month for all of the time during which said defendants may unlawfully remain in possession of said premises, together with interest thereon at the legal rate."

The judgment is in accord with the facts proved, except as to the $92, and with the prayer of the complaint. From the whole record, it is manifest that the judgment, with this exception, is correct. The cause is therefore remanded with direction that the judgment be modified in accordance with this opinion. Neither party will recover costs in this court.

DUNBAR, C. J., MORRIS, CHADWICK, and CROW, JJ., concur.

[No. 9467. Department Two. June 23, 1911.]

The State of Washington, *Respondent*, v. Harry Hatch, *Appellant*.[1]

Larceny—Evidence—Res Gestae. In a prosecution for grand larceny of money grabbed from a table during a card game, evidence as to the dealing of the cards preceding the larceny is competent upon the general issue of guilt and also as part of the *res gestae*, notwithstanding it tended to show a conspiracy between the accused and others to rob the prosecuting witness.

Larceny—Issues and Proof—Variance—Proof of Robbery. In a prosecution for larceny, it is not a variance to prove a robbery, since larceny is included in the offense of robbery, and it is no defense that the offense proved is greater than the one charged.

Appeal—Review—Exceptions to Instructions. Instructions not excepted to will not be reviewed on appeal.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 26, 1910, upon a trial and conviction of grand larceny. Affirmed.

J. E. Hawkins and *Welch & Crotty*, for appellant.

John F. Murphy, Hugh M. Caldwell, and *Herbert B. Butler*, for respondent.

Morris, J.—Appellant was tried upon an information charging grand larceny, and appeals from a judgment rendered upon a verdict of guilty.

The facts, in so far as they are pertinent to the errors assigned, are these: The prosecuting witness, Roden, met the appellant and two others in a saloon at Seattle. Roden was a stranger to the other three. He and Johnson, one of the others, sat at a table, when appellant and the fourth man came up and, sitting down at the same table, began a game of cards. Upon completing the game, one of the three suggested the four play a game for the drinks. The cards were dealt and Roden received four aces and a jack. Some one

[1]Reported in 116 Pac. 286.

suggested that they bet on the relative values of the four hands. Roden did not want to bet as he had no money with him, but he did have some with an aunt at Tacoma. Johnson then went to the bartender and obtained four envelopes in which the four hands were placed and the envelopes put in the saloon safe. Roden and Johnson then went to Tacoma and obtained $240 of Roden's money from his aunt, and returned to Seattle, to the same saloon, where appellant and the fourth man were awaiting them. They left that saloon and entered another, when appellant produced the envelopes and Roden looked at his hand and saw it was the same. Appellant wanted him to bet. He refused, saying he did not want to. He was told he had to, and to hurry up. He says the other three put their hands in their hip pockets and, fearing some injury, he took out his money and placed it on the table, when appellant grabbed it and ran, Roden running after him, until he came across a policeman to whom he complained of being robbed, and appellant was arrested and the money found on his person.

The first error assigned is the admission of the evidence regarding the dealing of the four hands of cards, upon the ground that it tended to show a scheme or conspiracy on the part of the three men, and nothing of that nature was charged in the information. The evidence was competent. There could be no valid objection to it, because it suggested something not definitely set forth in the information, so long as it was relevant to the crime charged.

"If evidence is relevant upon the general issue of guilt, or innocence, no valid reason exists for its rejection merely because it may prove, or may tend to prove, that the accused committed some other crime, or may establish some collateral or unrelated fact." Underhill, Criminal Evidence, § 90.

It was also part of the *res gestae*. Such evidence would have been competent upon an issue of conspiracy to rob, or to show the formation of a scheme to unlawfully deprive Roden of his money. But it was also admissible as a part of the

circumstances surrounding the commission of the offense charged, and as touching the criminal intent of the subsequent act. Under our statutes, Rem. & Bal. Code, §§ 2601, 2605, grand larceny, the crime here charged, may be committed in ten different ways. The information charged but one of these ten varieties. So long as the evidence supported the particular variety charged, which was the felonious taking with intent to deprive and defraud the owner of his money, it was not a ground of objection that the evidence also tended to establish a felonious taking by trick, device, or bunco game, another variety which was not charged. Any act tending to prove an intent to deprive and defraud Roden of his money was admissible under the charge made.

It is next contended that there was a variance between the information charging grand larceny and the evidence showing robbery. This was not a variance. Robbery includes larceny, the essential difference between them being the element of force or violence, necessary to establish robbery, but not an essential of larceny. *State v. Dengel*, 24 Wash. 49, 63 Pac. 1104. It is no defense to a crime charged and proved that the evidence is sufficient to establish a greater crime, which includes the one charged. There are many cases holding that larceny is sustained by evidence which also established robbery, and that lesser crimes charged are established by greater crimes proved. *State v. Graff*, 66 Iowa 482, 24 N. W. 6; *State v. Keeland*, 90 Mo. 337, 2 S. W. 442; *Commonwealth v. M'Pike*, 3 Cush. 181; *Commonwealth v. Squire*, 1 Met. 258; *Commonwealth v. Burke*, 14 Gray 100; *Commonwealth v. Walker*, 108 Mass. 309; *Commonwealth v. Creadon*, 162 Mass. 466, 38 N. E. 1119; *Farrell v. State* (Tex. Cr.), 44 S. W. 512; *Hickey v. State*, 23 Ind. 21.

Counsel for appellant contends that robbery is not included in grand larceny; hence, evidence establishing robbery is insufficient. That robbery is not included in grand larceny will be conceded by all, but that does not disturb the reason for holding that evidence of robbery establishes grand lar-

ceny, whether it be on the ground that the greater includes the less, or that the state may waive the greater crime and only charge and ask conviction upon the lesser.

Complaint is also made of an instruction given the jury, but we find no exception taken to this or any instruction, and hence cannot review it. This rule is too well established to require citation.

The judgment is affirmed.

Dunbar, C. J., Crow and Ellis, JJ., concur.

Chadwick, J., concurs in the result.

[No. 9471. Department Two. June 23, 1911.]

R. H. Brinker, *Appellant*, v. Oldham & Sons, *Respondent*.[1]

Pleading—Demurrer—Conclusions—Contracts—Consideration. In pleading a written contract which speaks for itself as to the consideration, an allegation that it was without consideration is nothing more than the pleader's conclusion, and without avail on demurrer.

Novation—Liability of New Debtor—Defenses. Where the debt of a corporation was discharged in consideration of assigned accounts and certain promissory notes executed by the president of the corporation, there is a complete novation, which is not affected by an accompanying agreement to employ the maker of the notes as a salesman, where it was expressly provided that the employment could be discontinued without affecting liability on the notes.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 25, 1910, in favor of the defendant, upon sustaining a demurrer to one cause of action, in an action for equitable relief. Affirmed.

Charles R. Crouch, for appellant.

Bausman & Kelleher, for respondent.

Morris, J.—Appellant brought this action to recover upon three alleged causes of action. The respondent answered

[1]Reported in 116 Pac. 263.

and counterclaimed. Upon the trial the court sustained a general demurrer to the third cause of action, and after giving appellant credit for the demands embraced in his first two causes of action—one for a balance of salary due and the other for a commission upon a sale of saws—awarded judgment against him upon the counterclaim. Appellant, by this appeal, claims error only in the sustaining of the demurrer.

The determinative facts are these: Appellant was formerly the president of the Puget Sound Saw Company, which on December 6, 1906, was indebted to respondent in the sum of $5,024.37. On that day appellant, respondent, and the saw company entered into a tripartite agreement, whereby the saw company assigned accounts to the value of $1,939.75 to respondent, and appellant executed sixty-two promissory notes, aggregating $3,084.62, in the discharge of this indebtedness. The respondent then agreed to employ appellant as a salesman upon a stated salary; providing, however, in the contract, that it might discontinue such employment at any time upon written notice, and "such a discontinuance of employment shall in no manner affect Brinker's liability on the notes given by him as above described, and those notes will be paid by him when they respectively mature, and shall in no manner affect the settlements and adjustments herein made." Appellant's third cause of action was to obtain a surrender and cancellation of these notes then remaining unpaid, upon the ground that the consideration of the notes was his employment as a salesman, and that the respondent, having breached this contract of employment, the consideration of the notes failed. The contract between appellant, respondent, and the saw company was attached to the complaint. The allegation that the consideration of the notes was the employment was, therefore, nothing more than the pleader's conclusion. The contract, being pleaded, spoke for itself as to the true consideration, and the court could look

beyond appellant's averment to the fact and determine whether or not such an averment was well pleaded.

It is apparent, from such a reference to the contract as we have made, that we have here a complete novation. The saw company, in consideration of its release of its old debt, assigns its accounts to respondent. Respondent, in consideration of this assignment and the execution of the notes by appellant, releases the saw company. Appellant, in order to procure the release of his company from the indebtedness to respondent, executes the notes. Thus, the creditor releases the old debt to the old debtor, and extends a new credit to a new debtor. The parties to this contract, desiring to leave nothing for interpretation, further agree that the employment of Brinker as a salesman is only an incidental employment that may be terminated at any time, and "such a discontinuance of employment shall in no manner offset Brinker's liability on the notes." It could not be plainer that the employment was in no way to affect liability upon the notes, and the court below was justified in ruling, in its sustaining of the demurrer, that appellant's liability upon the notes was to be determined irrespective of the employment.

Motion is made to dismiss the appeal because of a defective appeal bond. Having reached this conclusion upon the merits, we pass the motion.

The judgment is affirmed.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9416. Department Two. June 23, 1911.]

SAMUEL SLOAN, *Plaintiff and Appellant*, v. D. W. WEST, *as Administrator etc., Defendants and Appellants.*[1]

HUSBAND AND WIFE—MARRIAGE—COMMUNITY PROPERTY—PRESUMPTIONS—BURDEN OF PROOF. Where parties cohabited as husband and wife, without any marriage, there can be no community property or presumptions attending the marriage state; and the burden of proof is upon the one claiming an interest in property the title to which is vested in the other.

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal unless manifestly unjust.

APPEAL—REVIEW — HARMLESS ERROR — JURY TRIAL — QUESTION OF LAW. The trial of an action to try title as an equitable case, and refusing to submit all the issues to a jury, is harmless where the evidence was insufficient to overcome the legal presumptions flowing from deeds.

APPEAL—REVIEW—DECISION—SUBSEQUENT APPEAL—LAW OF CASE. Where, upon a former appeal, the supreme court held that the title to property was separate and subject only to defeasance by matters not in the record, and on a retrial, there was presented only a question of law as to the effect of deeds, the former decision is conclusive.

COURTS—PROBATE COURTS—EQUITABLE ISSUES—EXECUTORS AND ADMINISTRATORS—FEES. The superior court, sitting in probate, may exercise its equity powers, and having framed and tried an issue to try title, may, on final decree, allow administrators' and guardians' fees not covered by the pleadings on such issue.

EXECUTORS AND ADMINISTRATORS — FEES — ESTOPPEL TO DISPUTE. Where a man allowed his property to be brought into probate as community property and to remain there several years, employing attorneys and availing himself of the services of an administrator and guardian *ad litem*, the fees and expenses are properly charged to the property, although it was found in an equitable issue, framed to try title, that it was not community property, and that there was no property of the deceased for distribution.

Cross-appeals from a judgment of the superior court for King county, Albertson, J., entered August 10, 1910, upon findings and the verdict of a jury in favor of the plaintiff, in an action to quiet title. Affirmed.

[1]Reported in 116 Pac. 272.

Hastings & Stedman, Walter B. Beals, Frank A. Steele, Hughes, McMicken, Dovell & Ramsey, for plaintiff.

Charles E. Patterson, J. M. Gephart, Edward Von Tobel, and *W. E. Humphrey,* for defendants.

CHADWICK, J.—This case came on for trial in the superior court and before a jury under the direction of this court (*In re Sloan's Estate,* 50 Wash. 86, 96 Pac. 684, 17 L. R. A., N. S., 960), wherein the court said:

"We therefore hold that the proofs in the record amply show that the appellant and Mary Steves were never lawfully married, and that the property involved in this action is not community property. If the respondents have any interest in the property as children or grandchildren of Mary Steves, deceased, the burden is upon them to establish that fact, as it does not arise out of any marriage relation. We cannot anticipate the questions that may arise in the further progress of the trial, and all such questions must be left open for future consideration. We do hold, however, that if it should appear that there was no lawful marriage between the appellant and the deceased, that the deceased was at all times fully aware of their meretricious relations, and that in view of such relations their property was kept separate and apart; the respondents have no right or interest in the property now in controversy."

Reference to the former decision may be had for a history of the relations of Samuel Sloan and Mary Steves, or Mary Sloan as she was known prior to the filing of the petition of Samuel Sloan to set aside the property which had been listed as community property in the probate proceeding. Notwithstanding the fact that this court in its former decision held that Samuel Sloan and Mary Steves were not, and had not been during the many years of their consort, husband and wife, and that the only question open was whether the heirs of Mary Steves could bear the burden of showing an interest in the property arising outside of the marriage relation, that issue seems to have been gone over again, and the court, upon the whole evidence, directed

a verdict to the effect that Samuel Sloan and Mary Steves were not, at the time of her death, husband and wife, and that there was no community property. At this juncture, and having found that no community existed, the judge being of the opinion that, if Mary Steves, in her lifetime, or those following her had any interest in the property, it was a question of equitable cognizance, he proceeded as a chancellor, and upon the record as then made and some additional testimony, decreed that Samuel Sloan and Mary Steves were not husband and wife, although they had lived together as such; and that,

"While in law and fact said property was and is the separate estate of Samuel Sloan, he always held out the said Mary Sloan to the world as his lawful wife during the long period of their cohabitation; that upon her death he requested the said D. W. West to act as the administrator of her estate, and represented to him that said property was the community property of said deceased and himself, from a desire to conceal from the world the fact of their true relationship."

And further, that it was agreed between Samuel Sloan and Mary Steves,

"That all property acquired by the said Samuel Sloan in his own name should be the property of the said Samuel Sloan, free and clear from any right, title, or claim of the said Mary Steves or Mary Sloan, and that all property acquired in the name of Mary Sloan or Mary Steves should be the property of the said Mary Sloan or Mary Steves, free and clear of any right, title, or claim of the said Samuel Sloan."

The court denied the asserted claims of the administrator and the heirs of Mary Steves, but allowed compensation to the administrator and his attorneys, and to Mr. Gephart, who has acted as guardian *ad litem* for a minor heir.

As suggested in the former opinion, the burden of showing an interest in the property which is now in controversy was upon the defendants, for the law is that, unless there be in fact a marriage, there can be no community property. The

one cannot exist without the other, and the statutory and general presumptions attending the marriage state where the community property doctrine is recognized have no footing. Therefore, instead of the property being presumed to be community property because of the cohabitation of the parties, it being proved that they were not husband and wife, the law puts it absolutely in the one in whose name it is lodged, and it may be held by him as against all the world, unless wrested by the application of some equitable principle. We can agree with the trial court that the burden has not been sustained by the defendants. The testimony is not entirely satisfactory on either side. Such of it as is entitled to consideration as evidence tends to show that it was the design of the parties, especially of Mary Steves, to keep that which she regarded as her own separate from the property of Samuel Sloan. It may be that she had some notion that she might have an interest in the property standing in the name of Samuel Sloan. But, whether or no, the whole record tends to show that what was in her name she regarded as, and intended to keep as, her separate property. It would be idle to review the evidence here, believing as we do that it is wholly insufficient to overcome the presumption of title to which we have alluded.

The court has found, and there is some evidence to sustain his conclusion, that there was an agreement between the parties to keep their property separate. Under the oft-repeated ruling of this court that we will not disturb a finding entered upon conflicting testimony unless manifestly unjust, we shall not discuss the question of tenancy in common and other questions raised by defendants upon the theory that there was no such agreement.

An assignment of error to which counsel has devoted some strength of argument is that the court erred in refusing to submit all questions of fact to the jury, instead of, as it did, submitting the one question of marriage, and thereafter determining other questions as a chancellor. If the right of

defendants depended upon the question of contract or no contract alone, we may admit (without deciding) that there is merit in counsel's contention. But aside from the question of contract to divide earnings and to maintain separate property, we think, and have so held, that the testimony was insufficient to overcome the legal presumptions of title flowing from the tenor of the deeds; hence, that no prejudice resulted because of proceedings subsequent to the discharge of the jury.

It is also asserted that Samuel Sloan should not be heard to deny the community character of the property. It is true that he permitted the property now remaining to be inventoried with other property a part of which has been sold to meet debts and expenses; and his present assertion that he supposed the property, which had been in the name of Mary Sloan and which had been conveyed to a daughter, was to be included and administered upon as a part of the estate, is not entirely satisfactory to the writer of this opinion. Yet we feel that the character of the property is not an open question. It was squarely presented on the former appeal. We have taken the liberty to review the briefs and records in that case, and it being a question of law merely, we must assume that the court would have so held and sent the case back for distribution, instead of holding that the title to the property was in Samuel Sloan subject only to defeasance by something not appearing in the former record. We have said enough to cover the propositions submitted by defendants; that is, (1) Was there a legal marriage between Samuel Sloan and Mary Steves? (2) If there was no valid marriage, was Mary Sloan in her lifetime vested with any interest, legal or equitable, in the property? and (3) has Samuel Sloan estopped himself from claiming the property to be his separate property? and will proceed to discuss the cross-appeal of Samuel Sloan, who comes here challenging the right of the court to allow fees to the administrator, his counsel, and the guardian *ad litem*.

It is contended that, notwithstanding the proceeding is entitled in probate, it is in fact a suit to quiet title, and was so treated by this court on the former appeal, and that the pleadings present but two issues; that is, whether the property in question was the sole and separate property of Samuel Sloan, and whether or not Mary Steves died possessed of an equitable interest in any part of the property, in the event that she was not the lawful wife of Samuel Sloan; and that the court, having decided the general issue in favor of plaintiff, he could not grant relief to the administrator and counsel because it was not prayed for in the answers to the original petition of Samuel Sloan, the rule being that, in actions to quiet title, the relief granted must conform to the prayer of the bill and cannot extend beyond that prayed; citing 32 Cyc. 1380, and *Loeper v. Loeper*, 51 Wash. 682, 99 Pac. 1029; all of which is true, and would be controlling if we were inclined to admit that this is an independent action. Starting with the premise that the superior court of King county had jurisdiction of the subject-matter, it can make no difference whether the court sits in probate or in equity. It had jurisdiction to decide the whole controversy, even to purging its record of that which it could not finally adjudicate. The cases holding that a court sitting in probate is not robbed of its general equity powers were reviewed in *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626. We there quoted from the case of *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107, as follows:

"In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called 'probate procedure,' as distinguished from what is denominated 'civil' or 'criminal procedure.' But when the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been

made thereto, and then proceed to try it in a proper manner, as any other civil cause."

But it does not follow that an issue being framed to try an independent controversy, the court is to be precluded of its right to close the case under its probate jurisdiction. It is the same court, operating upon the same subject-matter, with plenary jurisdiction to hear and determine; and although it may, for its own convenience, divide its work into departments and send an issue from one department to another, its right to proceed to final judgment or decree is not impaired. The property was brought to the superior court in a probate proceeding as the common property of Samuel Sloan and Mary Sloan, and the court exercised a proper jurisdiction when it held that there was no property for distribution, and that the expenses of the proceeding should be met by the one who had submitted his property to the court. Plaintiff cites the following decisions of this court to sustain his contention: *State ex rel. Bogle v. Superior Court, ante* p. 96, 114 Pac. 905, and *Michaelson v. Seattle, ante* p. 230, 115 Pac. 167. But we do not conceive these cases to be in point. They were independent actions. There was no element of estoppel, and while we may admit that there is no issue framed by the pleadings, the disputed questions were tried out and the findings of the court are within its jurisdiction and discretion, independent of the collateral issue as to the title of the property. The administrator was appointed with the knowledge and acquiescence of Samuel Sloan, and the attorneys were employed by him, and the appointment of a guardian *ad litem* was a necessary incident to the probate proceeding. Plaintiff was a moving party. He permitted his property to remain in probate for several years. He allowed part of it to be sold to meet debts and expenses, and he allowed the proceeding to continue until ripe for distribution, and then, because he conceived, as he puts it, that "they were not treating him right," he asserts a claim which on its face was so doubtful

that it has taken two appeals to this court to settle in his favor. The law will give him his property, but will not deny compensation to those who have in good faith done his bidding. As to the reasonableness of the allowance for fees and expenses, we find nothing in the record warranting a review or reversal of the judgment of the lower court.

Affirmed.

MORRIS, CROW, ELLIS, and GOSE, JJ., concur.

[Nos. 8954, 8955. Department Two. June 23, 1911.]

L. F. BOOTHE, *Appellant*, v. SUMMIT COAL MINING COMPANY *et al.*, *Respondents*.[1]

CORPORATIONS — ACTIONS BETWEEN STOCKHOLDERS—ACCOUNTING—RECEIVER—INJUNCTION. Where there was a deadlock between two equal stockholders of a corporation, an action to settle their rights, appoint a receiver, and wind up the corporation should be allowed to go to final adjudication before requiring a sale of the assets, unless necessity therefor exists; and it is error, upon appointing a receiver, to direct a sale and enjoin the parties from taking any steps in the proceedings to secure an accounting and determine the rights and equities of the parties.

SAME—RESCISSION—SALE OF PROPERTY — NECESSITY. Where an action is brought by one of two equal stockholders of a corporation, the plaintiff alleging his exclusion from control, and mismanagement and failure to account by the defendant, and a receivership and accounting is asked, it is error to order a receiver's sale of all the assets of the corporation, consisting of real estate and mining machinery, before the accounting is had and the rights and equities of the parties are adjudicated, where there appears no probable depreciation in the value of the property, especially where the defendant is indebted to the corporation, and has not made payments ordered by the court, and the plaintiff would be at a disadvantage in bidding at the sale until the purposes of the receivership have been accomplished.

Appeal from orders of the superior court for Kittitas county, Kauffman, J., entered June 18 and 24, 1910, grant-

[1]Reported in 116 Pac. 269.

ing an injunction and directing a receiver's sale of the property of a corporation, after hearings before the court. Reversed.

Kerr & McCord, for appellant.

J. L. Corrigan, for respondent Linden.

Crow, J.—This cause has heretofore been in this court on plaintiff's appeal, at which time we reversed a judgment of dismissal and remanded with instructions to appoint a receiver for the defendant corporation, to take an accounting between it and its stockholders, to require repayment by the defendant R. J. Linden of all salary received by him in excess of $125 per month and to wind up the business and dissolve the corporation. *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 104 Pac. 207. After remittitur, the trial court appointed a receiver, who took possession of the assets and property of the corporation. By the order of appointment the receiver was directed to sell such assets and property. On application of the plaintiff, this order was modified by annulling, vacating, and setting aside that portion relating to and directing a sale, but at the same time the following order was entered:

"It is further ordered, adjudged and decreed that the above named plaintiff, his attorneys, agents, servants and all other persons whomsoever, be and they are hereby enjoined and restrained from commencing and prosecuting any action at law or suit in equity concerning or relating in anywise to the business or affairs of the Summit Coal Mining Company, and said plaintiff, his attorneys, agents and servants particularly enjoined and restrained from taking any steps and proceedings in this case until the further order of the court."

Some time after his appointment, the receiver made a written report, in which he listed the property, stated its condition, and asked an order directing its sale. All parties were thereupon notified to appear and show cause, if any they had, why an order of sale should not be entered. The

plaintiff appeared and filed written objections. Upon the hearing, evidence was admitted, the plaintiff's objections were overruled, and an order was entered directing the receiver to offer at public sale to the highest bidder for cash the assets and property of the corporation in one lot for a lump sum. The corporation books, its accounts, its bills receivable, and certain fixtures and furniture situated in its Portland office, were reserved from sale. The plaintiff, L. F. Boothe, has appealed (1) from the order of injunction, and (2) from the order directing the sale. These appeals, although taken separately, will be considered together.

The record shows the corporation to be solvent, free from indebtedness, and that the only parties interested in its property or assets are the appellant, Boothe, and the respondent R. J. Linden, each of whom owns one-half of its capital stock. Irreconcilable disputes and differences have arisen between these two stockholders. Linden, in possession by a subservient board of trustees, excluded Boothe from participation in the corporation or its affairs. The controlling purpose of this action is to secure an adjudication and settlement of the respective rights of these stockholders. A receivership was ordered in aid thereof, withdrawing the corporation and its property from the exclusive control of Linden, and placing it *in custodia legis*. There is no contention that the corporation is insolvent, or that it should for that reason be dissolved, and there is no reason why the parties in interest should not litigate the issues herein to a final adjudication of their respective rights and liabilities. Appellant insists respondent is indebted to the corporation, that he has been guilty of mismanagement, and that he has failed to properly account. The appointment of a receiver is not the only relief sought by appellant, nor is it the controlling one. He seeks an accounting, and should be permitted to proceed with the prosecution of this action until it is obtained. The trial court therefore erred in entering the restraining order.

Appellant, in his written objections to the proposed order of sale, contends the corporation has no debts, that the relative interests of Linden and himself are practically the same as those of partners; that no rights of third parties are involved; that no necessity exists for an immediate sale; that it will be detrimental to appellant's interests to sell before an accounting; that Linden should be required to pay to the corporation any indebtedness that may be found to be due from him; that he has not complied with the order of this court requiring him to pay to the corporation or its receiver excess salary which he has drawn; that the receiver has failed to collect the same; that if a sale be made prior to any accounting, Linden will be the only bidder, he having the advantage of retaining moneys due from him to the corporation; that appellant will be at a disadvantage and unable to bid the true value of the property; that appellant has been enjoined and restrained from enforcing an accounting; that the receiver has enforced none; and that, if Linden be required to pay to the receiver such sums as are due from him, one-half thereof, subject to the expenses of the receivership, will become available to the appellant, who will then be in a position to bid at a public sale and force the property of the corporation to sell for a sum commensurate with its value.

The receiver and respondent Linden introduced evidence to show the mine had been shut down and was idle; that all machinery and other personal property of the corporation had been carefully stored, but that they would all depreciate in value unless an early sale be made. From all the evidence, we conclude no probable depreciation in value of the property sufficiently appears to require a sale at the present time, to avoid material loss. The question before us is whether a sale should be ordered prior to an accounting by which it may be determined what indebtedness, if any, is due from Linden, or prior to repayment of the excess salary drawn by him. In other words, should a sale be made until it becomes necessary

to effect a final dissolution and distribution, according to the ascertained interests of the respective parties.

"Ordinarily a receivership should be terminated as soon as practicable after its purposes have been accomplished, and in proceedings in which the main object is the conversion of assets into money and its distribution among those entitled thereto, the court has undoubted power to order a sale of the property whenever it appears proper or necessary in order to preserve the assets and protect the rights of the parties, and this although the conflicting claims to liens and priorities have not been adjudicated. The order is one resting in the sound discretion of the court—a judicial discretion, however, not arbitrary, but impartial, to be exercised in obedience to the rules of law. But it is not proper to order a sale and distribution at a preliminary stage of the suit when the cause is not ready for determination on the merits, or in the order of appointment at such preliminary stage to settle the principles of the cause and order distribution; . . ." 34 Cyc. 310.

The primary purpose of this receivership is not to take possession of the corporation property for an immediate sale, but to hold, conserve, and protect it pending the principal litigation, and until such time as the issues and controversies arising between the parties may be finally determined. No insolvent corporation is here involved. A court of equity, holding property by its receiver, may in its discretion direct a sale prior to final adjudication, when the property becomes liable to loss or material depreciation. The property here involved is a coal mine, consisting of real estate and machinery. A receiver appointed to take charge of property, particularly real estate, should ordinarily be directed to hold, care for, and preserve the same until the issues in the receivership action are finally determined. Conditions sometimes arise under which it becomes necessary and proper to direct an earlier sale to preserve the interests of the parties and do equity, but no such conditions are here shown. In making any order of sale, however, the court should, as nearly as possible, ascertain and preserve rights and equities of the parties, so that

one of them may not obtain any undue advantage. Ordinarily a sale should not be made until the various issues arising between the parties have been finally adjudicated and determined. Mr. Pomeroy, at § 209, vol. 1, of his Equitable Remedies, being vol. 5 of his work on Equity Jurisprudence, says:

"When the interests of the parties demand it, or make it desirable, the court may order a receiver to sell the whole or a part of the property. What facts are sufficient to induce the court to make such an order must of necessity vary with the circumstances of each particular case. When it appears that affairs are rapidly growing worse under the receiver's management, and a majority of those interested believe a sale to be desirable, it may be ordered. On the other hand, when the condition of the property is such that an immediate sale will result in a great loss, and where the purposes of the receivership have not been accomplished, the order will be refused."

We do not find in the record before us any circumstances, facts, or conditions requiring a sale of the assets of this corporation prior to such time as an accounting may be had, and the several parties have been required to pay or secure such sums as may be due from them to the corporation. The orders granting the injunction and directing the sale are reversed, and the cause is remanded for further proceedings in accordance with this opinion.

Dunbar, C. J., Chadwick, and Morris, JJ., concur.

[No. 9385. Department One. June 23, 1911.]

Hans Pederson, *Plaintiff*, v. North Yakima & East Selah Irrigation Company, *Appellant*, C. A. Bryant *et al.*, *Respondents*.[1]

Brokers—Right to Commissions—Payment—Performance by Owner. Although a broker's contract provided that it should receive its commissions out of payments made by purchasers on contracts for land and water rights, the owner is liable for the whole commissions where the owner breached its contract to furnish water and the payments were not made because of the owner's failure to perform.

Corporations—Transaction Between Member and Company—Deeds—Failure of Consideration—Cancellation. Where a deed by a stockholder to an irrigation company, made in good faith upon the advice of an attorney, in consideration of water rights for certain lands, is held void as against public policy, and the consideration fails through inability of the company to furnish the water, the grantor is entitled to a reconveyance of the land.

Appeal from an order of the superior court for King county, Frater, J., entered October 19, 1910, allowing a claim against an insolvent corporation, after a hearing before the court. Affirmed.

Blaine, Tucker & Hyland, for appellant.

McClure & McClure, Humphries & Cole, and *Aust & Terhune*, for respondents.

Gose, J.—The North Yakima & East Selah Irrigation Company, the appellant, was incorporated in January, 1908. Its object was to sell arid land, together with water for its irrigation. Its assets passed into the hands of a receiver on March 12, 1909. In September, 1908, it entered into a contract with the Inland Realty & Investment Company, a corporation, hereafter called the claimant, whereby it gave the latter the exclusive right to sell certain of its land, together with water for its irrigation. The claimant proceeded

[1]Reported in 116 Pac. 279.

to make contracts for the sale of the land and water in harmony with its contract. At the time of the appointment of the receiver, it had made contracts of sales which, if carried out by the appellant, entitled it to commissions aggregating $25,056.67. Its claim for this amount was presented to the receiver and was, after hearing, allowed by the court. No part of this commission has been collected by the appellant. This appeal is prosecuted from an order allowing the claim.

The contract between the appellant and the claimant provided that "first party [the appellant] is in no manner liable to second party [the claimant] for the amount due second party on the purchase price of said land, and shall be liable only for the portion of each of said purchase money installments coming to second party, as the same may be collected by the first party, and not otherwise." It further provided that the purchasers should make the second payment upon their land and water contracts when water was delivered by the appellant in lateral ditches contiguous to the tracts sold.

The appellant contends that the court erred in allowing the claim. The evidence shows that the purchasers were able and willing to perform, and to make the payments as stipulated in their contracts, and that they did not do so on account of the failure of the appellant to deliver water to the land as it had agreed to do. The clause quoted would be controlling if the loss of the commissions was attributable to the default of the purchasers, but that is not the case before us. The claimant has lost its commissions through the default of the appellant. It has broken both the letter and the spirit of its contract, with both the claimant and the purchasers, and upon the plainest principles of right and justice, it must be held responsible to the claimant for its loss. The commissions were due upon duly executed contracts of sale. The claimant's right is not defeated by the appointment of the receiver. 34 Cyc. 266; *Central Trust Co. v. East Tennessee Land Co.*, 79 Fed. 19; *Everett v. Gores*, 89 Wis. 421, 62 N. W. 82; *Chemical National Bank v. Hartford Deposit Co.*,

161 U. S. 1. In principle the case does not differ from one where one party sells an article to another upon the agreement that it shall be paid for in goods to be manufactured by the purchaser. If the purchaser defaults, he is liable in damages for the value of the article sold.

The appellant corporation was organized by Clark O'Brien and C. A. Bryant, the former owning two-thirds and the latter one-third of its capital stock. Thereafter, before the appointment of the receiver, Bryant transferred his stock to O'Brien, and conveyed to the appellant a right of way over certain of his land for a spillway, O'Brien agreeing to pay him $500 on terms and $35,000 in water rights. These water rights were evidenced by a power of attorney executed by the appellant to Bryant, and by contract between the appellant, acting through O'Brien as its president and sole stockholder, and Bryant, by which the appellant agreed to furnish the latter water to irrigate 590 acres of land described in the power of attorney. The contract provided that the water rights should be superior to any mortgage or other lien upon or against the water system. The appellant defaulted in its contract to furnish water to Bryant, and he presented a claim to the receiver for the sum of $32,452, claiming that the contracts referred to gave him a first lien upon the appellant's irrigation system. The appellant moved the court to disallow the claim, on the ground that the contracts were "void as a fraud upon the rights" of the appellant. The claim was disallowed on that ground, but the court ordered the receiver to reconvey to Bryant and his wife the right of way for a spillway which they had theretofore conveyed to appellant. The correctness of this order is also challenged by the appeal. The record discloses that Bryant and his wife entered into the several contracts mentioned in good faith, and that they relied upon the advice of their attorney, who was also at the time the attorney for the appellant. If the contracts which furnished the consideration for the deed conveying the right of way for the spillway were

void as to the appellant, upon the ground of public policy or otherwise, Bryant acting in good faith was entitled to a reconveyance of the right of way. Under the view taken by the court, the consideration for the deed had failed, and the court was right in directing the receiver to reconvey. When Bryant assigned his stock to O'Brien, the latter became the sole stockholder of the appellant, and was in truth and fact the corporation.

The judgment is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 9446. Department Two. June 23, 1911.]

SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*, v. SEATTLE-TACOMA POWER COMPANY, *Respondent*.[1]

ACCORD AND SATISFACTION—PARTIAL PAYMENTS—CONSIDERATION—PROTESTS—EVIDENCE—SUFFICIENCY. Under a contract for an electric current at a specified rate, which further provided for a minimum payment of $1,000 per month, there is no accord and satisfaction, every essential feature being lacking, where checks for $1,000 were sent monthly with a claim of a payment in full, but the power company returned the vouchers therefor unsigned with the statement that the payments were applied upon account only, and in the dispute that arose, the customer expressed a willingness to pay whatever moneys were justly due, to take up and settle the question, and continued making the payments of $1,000, confessed as due, until such time; there being no consideration for an accord and satisfaction.

ELECTRICITY—SUPPLY—ACTION FOR PRICE—CONTRACT—METHOD OF CALCULATION—DEFENSES. Where the amount due from a railroad company to a power company for electric current was calculated in one of the two methods provided for in the contract, the railroad company cannot be heard to say that it was not a proper method; and it is immaterial that bills rendered for current varied slightly from the evidence, under an accurate computation by instruments as against computations by eye reading at the time the bills were prepared.

[1]Reported in 116 Pac. 289.

Same—Defenses. Where a railroad company, a heavy consumer of electric current, never tested a meter for accuracy, as it might have done under its contract for power, in an action for the price of current, little credit should be given to its claim of inaccuracy of the meter.

Same—Supply—Performance of Contract. The fact that the voltage dropped a little below that required by a contract for electric current, on a few occasions, is no defense to an action for the price, where the consumer was not damaged by lack of power and received all the current it required.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 29, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for equitable relief. Affirmed.

Will H. Thompson and *Morris B. Sachs*, for appellant.

Peters & Powell and *Norwood W. Brockett*, for respondent.

Morris, J.—This action is a controversy between these respective companies over the amount of electric power furnished by the power company to the railway company, and arose in this manner: In April, 1906, a written contract was entered into between the two companies for the furnishing of electric power to be used by the railway company in the operation of its street car system from Seattle to Renton, the incidental lighting and machinery of its shops, and for sale in small units to consumers not within reach of the power company's lines. The contract fixed the price, the place, and pressure at and under which the current was to be delivered, the term of its existence at twenty years, the method of measurement, and the maximum and minimum horse power to be furnished. It was further provided that the minimum price should be $1,000 per month, which sum it was agreed should be paid by the railway company each month during the life of the contract, irrespective of the amount furnished, except for such interruptions to its service as might be caused by public servants, strikes, or other causes beyond the control

of the railway company. More extended reference will be made to the contract as it will be found necessary in the discussion of the questions raised by the appeal. The power was furnished and used continuously from the making of the contract until October 24, 1907, when the power company, claiming the railway company was in arrears for power furnished up to that time, to the amount of several thousand dollars, threatened to discontinue furnishing power unless these arrears were paid. The railway company thereupon brought this action, seeking to enjoin the power company from discontinuing its service. A temporary injunction was issued, and the power company answered, setting up its counterclaim in the amount claimed to be due, and by supplemental answer continuing its claim up to the time of trial; and demanded judgment accordingly. The railway company contested the right of recovery, claiming a breach of the contract on the part of the power company. Trial was had upon these issues, resulting in judgment in favor of the power company upon its counterclaim, in the sum of $46,674.70, and the railway company appeals.

The only question involved in the appeal is one of fact—alleged error in the findings of the court as to the amount of power furnished and the amount due therefor; save in one particular in which a question of law is submitted, growing out of the payment monthly of $1,000, during the controversy, it being suggested that the payment and receipt of this amount was in law an accord and satisfaction. We will dispose of this claim first. The provision of the contract calling for the payment of this $1,000 is as follows:

"Should the amount to be paid by the railway company to the power company for services rendered hereunder as calculated by the method provided in sub-paragraph A of this paragraph Fifth [which fixed the price at the rate of one cent per kilowatt hour, meter measurement] and also as calculated by the method provided in sub-paragraph B hereof [providing that the total price to be paid any month at the

rate of one cent per kilowatt hour should not be less than an amount derived by multiplying the average maximum consumption expressed in horse power, during two fifteen-minute intervals of time in each month when the railway company's demand was greatest, by the rate of three dollars per horse power] be less than $1,000, then the railway company agrees that it will pay a minimum of $1,000 for service during that month. That is in any event, anything elsewhere in this agreement (except in paragraph tenth hereof) to the contrary notwithstanding. Railway company agrees to pay power company a minimum amount of $1,000 per calendar month for each and every month of the life of this agreement."

Some time after the dispute arose as to the proper method of determining the monthly bills, the railway company adopted a practice of mailing the power company each month its check for $1,000, accompanied with the statement that such sum was in full payment for the month covered by the remittance. This accompanying statement, which was intended as a voucher, would be returned by the power company unsigned, and accompanied by a further statement that the amount was received as payment on account merely, and for no other purpose. During this method of payment, letters passed between the companies, in which the railway company reiterated its position that the checks were sent upon the theory of full payment and under no other conditions; the power company as earnestly contending the amount was received and accepted as a payment on account and for no other purpose. The last letter of the railway company, making any protest to the application of the $1,000 by the power company, is dated December 12, 1906, and is in reply to a letter of the power company of December 11, stating its intention to apply the payment on account only. This seems to have ended the controversy, except that the railway company continued each month to send its $1,000 in full settlement, with an enclosed receipt voucher, which was as uniformly returned unsigned by the power company. So that, subsequently to December, 1906, the railway company had

full knowledge that the power company would not accept the $1,000 each month except as a part payment on account. As further significant of the attitude of the railway company in making this monthly payment, we quote from its letter to the power company under date of November 28, 1906, in which, in referring to these payments, it says:

"As per my promise to your Mr. Workman on November 27, 1906, will say that after consultation with the directors of the Seattle, Renton & Southern Railway Company, it has been decided by the company to stand by the offer made by me of paying the amount designated in our contract as the minimum amount, namely $1,000 per month until such time as your company has put itself in condition to comply with the terms of the contract between our two companies. Enclosed therefore I send you check for $2,000, which is a trifle in excess of the sum which would be due under such minimum payment up to November 1, 1906."

These payments of $1,000 monthly seem to have commenced with May, 1907. Prior to that time the railway company had mailed to the power company its check in such an amount as it conceived to be the amount due under the kilowatt-hour readings of its meters, and which in each instance, subsequent to January 1, 1907, was a less sum than the bill rendered by the power company. On October 26, 1907, which was after the commencement but before the trial of this action, the railway company wrote a letter to the power company, in which we find this language:

"This company is willing to pay whatever moneys are justly due and owing to your company for power furnished to it, such amounts to be determined by the method laid down by the contract and not by the arbitrary decision of the officials of your company as to such method. This company has paid your company in full for the period from April 24, 1906, until February 1, 1907, and also from June 1, 1907, to date; but during the period from February 1 to June 1, as per our correspondence, we are willing to take up and settle under the method provided by the contract for power used during such months if there is any additional sum owing

beyond what has been paid according to our meter reading for such period. As the writer informed your Mr. Workman over a year ago that this company was anxious to have a determination of the meaning of such contract settled so that both parties would know exactly what rightful charges could be made, we are still willing and anxious to have, if possible, a friendly adjustment of our differences and settle once for all what is the meaning of the contract, regarding the method of determining the monthly bills. We are perfectly willing to have the present case set down and tried as our pleadings have been drawn, so as to settle absolutely the rights of the parties under the terms of such contract . . . As to the difference of amounts, we consider such matters to be settled in a suit if not in a friendly way."

We cannot conceive, under these facts, how the payment of $1,000 each month by the railway company and its receipt by the power company, under the conditions indicated in the payment and receipt, could operate as an accord and satisfaction. There was no dispute between the parties but that, under any construction of the contract, $1,000 was due each month. That sum was liquidated, and became a stated account in any event, whether the method adopted by the power company or the method adopted by the railway company was the correct method for determining the correct amount to be paid each month. It was not, therefore, the payment of a smaller amount as full payment for a larger amount. Neither could it be construed as the determination of the railway company, beginning with the May payment, that even according to its interpretation of the contract it was all that was due. It conceded that much due in any event, and accordingly paid it, and in all its letters indicated its willingness to pay "whatever moneys are justly due and owing," and expressed its willingness "to take up and settle under the method provided by the contract," and was "anxious to have a determination of the meaning of such contract settled so that both parties would know exactly what rightful charges could be made," either in "a friendly adjustment" that would "settle once for all," or await the outcome of

the trial of the present case, and in such a forum, "settle absolutely the rights of the parties." Since, then, it was conceded by the railway company that there was no dispute as to $1,000 being due each month, and that this amount was dependent upon no condition or contingency ever in dispute between the parties, how can the doing of that which, by every conception of the contract, it was bound to do, operate as a discharge from doing something further, which was the only dispute between them? In paying this monthly amount, the railway company paid nothing further than its confessed obligation, which was not by way of compromise of its disputed obligation; leaving, as clearly indicated in its letters, notwithstanding its notation of full payment, an assumption that something more might be due, which it was ready to determine in a friendly adjustment, or await the decision of the court upon the disputed claims.

Neither could it be an accord and satisfaction, because the power company had an absolute right to receive this sum each month from the railway company. It may or may not have been entitled to more, but its absolute right to this sum was disputed by no one. Appellant's letter of November 28, 1906, is a clear recognition of this situation, when it says, "it has been decided by the company to stand by the offer made by me of paying the amount designated in our contract as the minimum amount, namely $1,000 per month." An offer to pay the confessed minimum amount due can hardly be construed into a payment of the maximum amount due, nor as a payment in settlement of the whole controversy. While it may be difficult to lay down an exact rule that will fit all contentions of accord and satisfaction, it will not be disputed that running through all the cases is the principle that the sum received and accepted by the creditor must be less than the sum he considers himself entitled to receive; and that it must not only be shown that the debtor gave the amount in full satisfaction, but that the creditor received it as such. *Perin v. Cathcart*, 115 Iowa 553, 89 N. W. 12. The

case before us is devoid of all these essentials. It was the payment of a confessed and undisputed account stated. It was not intended nor received as a liquidation or settlement of the dispute. There was no agreement, nor anything that could be implied as an agreement on the part of the power company, in accepting what was its liquidated account. Neither was the payment of the liquidated account a tender upon the unliquidated account, for it required the whole amount to satisfy the liquidated debt, and there was nothing left to operate as a consideration for any accord and satisfaction of the unliquidated debt. It may be safely asserted that, underlying all application of the rule of accord and satisfaction, in cases of both liquidated and unliquidated accounts, where the creditor is absolutely and in any event entitled to receive a definite and fixed sum, but claims an additional sum to be his due, which additional sum only is disputed by the debtor, the payment by the debtor of the definite and fixed debt and its acceptance by the creditor, though tendered as payment in full, will not constitute an accord and satisfaction. *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229, 44 N. W. 2; *Walston v. Calkins Co.*, 119 Iowa 150, 93 N. W. 49; *Weidner v. Standard Life & Accident Ins. Co.*, 130 Wis. 10, 110 N. W. 246; *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N. W. 733, 123 Am. St. 315, 14 L. R. A. (N. S.) 954; *Chrystal v. Gerlach* (S. D.), 125 N. W. 633; *Mintzer v. Supreme Council*, 41 Misc. 512, 85 N. Y. Supp. 23; *Howe v. Robinson*, 13 Misc. 256, 34 N. Y. Supp. 85; *Cochenour v. Rieser*, 58 Misc. 521, 109 N. Y. Supp. 807; *Louisville N. A. & C. R. Co. v. Bruce*, 109 Ky. 388, 59 S. W. 323; *Robinson v. Leatherbee Tie & Lumber Co.*, 120 Ga. 901, 48 S. E. 380; *Durchman v. Dunn*, 101 Fed. 606; *Martin v. White*, 40 Ill. App. 281.

Appellant strongly relies upon *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785, and quotes it as a leading case. It will be noted that the claim there was unliquidated, being a bill for $670 for physician's services, which

the debtor conceived to be too large, and sent his check for $400 in full satisfaction, requesting the physician to either accept it upon the condition named or return it by first mail. To this letter the physician made no reply, but kept the check, and after the expiration of a year, brought his action to recover the balance. The case is, therefore, not in point upon the facts where, as here, we have the check sent in an amount liquidated as due in any event; and the court makes the distinction, saying, where the demand is liquidated, a different rule should be applied, and that in such case the acceptance of the less sum would not discharge the debt even if a receipt had been given, for the reason that the element of a consideration was lacking and the obligation of the debtor to pay the larger sum not satisfied. So that the case, in so far as it touches a case of liquidated account, is authoritative for the rule we are here asserting. That such is the rule in New York cannot be doubted. In addition to the New York cases cited, *supra*, see: *Laroe v. Sugar Loaf Dairy Co.*, 180 N. Y. 367, 73 N. E. 61, and *Harby v. Henes*, 45 Misc. 366, 90 N. Y. Supp. 461.

Coming now to the facts, it is contended that the method employed by the power company and adopted by the court below in computing the amount due was not in accordance with the contract; and that the evidence shows the power to have been supplied at a less voltage and at a greater loss than fixed by the contract. The contract provided two methods of computing the amount due for power; one at the rate of one cent per kilowatt hour, meter measurement, the other at the rate of three dollars per horse power, obtained by multiplying the average of maximum consumption of horse power by the railway company during two fifteen-minute intervals in each month, when the railway's consumption was greatest; the amount to be paid in any month by the kilowatt-hour method not to be less than the amount determined by the horse power method. It was further provided that commercially accurate integrating wattmeters of the

power company should be used in recording the kilowatt hours, and that a Bristol recording wattmeter should be used in computing the amount upon the horse power basis. The power company used the Bristol recording wattmeter, and computed the amount due under the horse power method; the difference between these two methods being that the integrating wattmeter automatically integrates and registers the past sum total of consumption, while the Bristol wattmeter does not integrate, and the integration must be determined by the eye or by use of a planimeter. The figures used by the court below in determining the amounts to be charged each month were obtained by using the planimeter. This being the method agreed upon by the contract, appellant cannot now be heard to say it was not a proper method.

The voltage required by the contract was not less than 580. Upon a few occasions, allowing for a two per cent loss in transmission permitted by the contract, it dropped below that requirement. In some instances the voltage was above the contract requirement during the fifteen-minute periods, which were to be used as a basis for ascertaining the amount of power furnished. We can see no breach of the contract in this regard, especially as there is no claim nor contention that the railway company was ever damaged by lack of power, or received less than it required. Objection is also made to the accuracy of the Bristol recording wattmeter. It is conceded by all the witnesses that any meter will sometimes run fast, sometimes slow; and that, if it is corrected occasionally, it will average up. The railway company was permitted under the contract to test the meters for accuracy. It does not appear that it ever did so. If it was dissatisfied with the meter, it should have taken advantage of this provision of the contract. Not having done so, but little credit should now be given to its claim of inaccuracy. Other claims of breaches of the contract are made, but we do not find them substantiated by the record. For instance, the claim is made that, during some of the months of the contract, the bills ren-

dered were in a greater sum than the power company now claims due. This seems to be accounted for in the difference between the eye reading and the use of the planimeter. But inasmuch as the power company only seeks to now recover the planimeter readings, we see no injury to the railway company because the bill rendered is larger than the submitted proof. Complaint is also made of the court's findings, because in a few instances the bill rendered was less than the amount found due. In each of these instances we have found the amount awarded by the court to be the amount substantiated by the testimony. The difference is probably accounted for by the difference in the eye reading at the time of rendering the bill and when accurate computation was made by the planimeter for use at the trial. Nine instances are cited where the court, as contended for by appellant, has allowed for certain months, not the amount of each month's bill, but rather the exact amount of the following month's bill. We have, however, carefully checked up the court's award with the evidence, and find in each of these instances the testimony supports the finding.

The findings of the court being amply sustained by the record, they will not be disturbed. We believe from a reading of the record they are both justified and accurate, and the judgment based thereon is affirmed.

Chadwick, Crow, Mount, and Ellis, JJ., concur.

[No. 9244. Department One. June 23, 1911.]

FREDERICK BADERE, *Appellant*, v. JOHN C. GOODRICH *et al.*, *Respondents*.[1]

CORPORATIONS—SALE OF STOCK—FRAUD—EVIDENCE — SUFFICIENCY. Where plaintiff was induced to sell the controlling interest in a corporation, and in an action for damages, claimed that defendant was guilty of fraud, and wrongfully discharged the plaintiff as an officer, and so mismanaged the corporation that its assets were sold in bankruptcy proceedings, to plaintiff's damage in a sum equal to the value of his stock in the company, the evidence is insufficient to establish defendant's fraud in the purchase of the stock, where it appears that plaintiff was solicitous to sell after several months negotiations, that the price was fair and the sale without fraudulent inducement and there was no fraud in the sale in bankruptcy, that the plaintiff was discharged from his position for good cause, and that the bankruptcy proceeding resulted from plaintiff's refusal to advance an inconsiderable sum as his *pro rata* share for the renewal of a mortgage due to a bank.

CORPORATIONS — OFFICERS — EMPLOYMENT — DISCHARGE — SALE OF STOCK—CONSIDERATION. Where a stockholder sold a controlling interest in the stock in consideration of $1,000 and of a contract to employ him as secretary for one year, the obligation is mutual and he is subject to discharge for diverting property and violating the by-laws, and cannot recover the value of his stock for failure of consideration.

CORPORATIONS—EMPLOYMENT OF OFFICER — CONTRACT — BREACH—LIABILITY OF STOCKHOLDER. Majority stockholders are not liable for the wrongful discharge by the corporation of one of its officers.

SAME—DISCHARGE—RECOVERY FOR SERVICES. Upon the dismissal for good cause of an officer of a corporation employed for one year, his recovery is limited to *quantum meruit* for the service rendered up to the time of the discharge.

GOSE, J., dissents.

Appeal from a judgment of the superior court for King county, Tallman, J., entered August 11, 1910, upon granting a nonsuit in an action for damages, after a trial before the court and a jury. Affirmed.

E. P. Edsen and *John E. Humphries*, for appellant.

Shank & Smith, for respondents.

[1]Reported in 116 Pac. 274.

CHADWICK, J.—On April 23, 1906, Frederick Badere, I. Badere, and John P. Badere incorporated the Teanaway Coal and Mining Company. The Baderes owned certain property in Kittitas county, which they made over to the corporation; so that the capital stock of the company, 3,500 shares of a par value of $100, was represented by 320 acres of land which the appellant and his brother had acquired under the stone and timber act, 286 acres of land which they purchased of the Northern Pacific Railway at $2.50 per acre; 40 acres of land which had been purchased for $700; and a sawmill and certain personal property which had been bought for $4,570. In addition to the value of the property, some money had been spent in the way of improvements, the amount of which does not definitely appear. There was, at the time of the incorporation, a mortgage indebtedness of $8,600. It appears that the Baderes were financially unable to carry on and develop the property of the corporation, and sought to interest respondent Goodrich, who had some means, in the company. After a time, he bought one-half of the capital stock. He paid for one-fourth $8,000, and for the other one-fourth $6,000. He also made two loans to the company, one for $11,500 which was used for the purchase of 160 acres of land, and one for $2,000 which went for general purposes.

The affairs of the company still languishing, appellant sought to induce Goodrich to take over the control of the company. Negotiations tending to this conclusion ran over several months. Goodrich had taken the matter up with a Mr. Strahorn of Spokane, who advised him that, the land being in the territory of the Northern Pacific Railway and its products subject to transportation by that company, the investment would probably not be satisfactory should the value of the property prove to be in coal. Goodrich went east, remaining five or six months. Upon his return, appellant renewed his importunities, the result being that Goodrich took over the control of the property and advanced

$5,000 for the uses of the company. On November 10, 1906, a contract evidencing this agreement was entered into, the material parts of which follow:

"That said party of the first part agrees to pay to said party of the second part the sum of one thousand ($1,000) dollars lawful money of the United States of America, as soon as said party of the second part assigns to said party of the first part one hundred (100) shares of the capital stock of the Teanaway Coal & Mining Company.

"That in consideration of the assignment by said Frederick Badere of one hundred (100) shares of said capital stock to said John C. Goodrich, it is hereby mutually agreed that said Badere shall, for the period of one year from the date of such assignment, occupy and discharge the duties of general manager and secretary and treasurer of the said Teanaway Coal & Mining Co., as prescribed by the by-laws.

"As a further consideration for the assignment of said one hundred (100) shares by said Badere to said Goodrich, said Goodrich, within the next thirty days, agrees to advance the sum of five thousand ($5,000) dollars, to be used in making investments for the said Teanaway Coal & Mining Co., two thousand to be invested in the company's name and the balance in the name of the second party, and in case of refusal by the said Goodrich to so advance said five thousand ($5,000) dollars, the assignment of said one hundred shares (100) of the capital stock of the said Teanaway Coal & Mining Company, shall become null and void and of no effect whatever."

Accordingly 100 shares of stock was made over to Goodrich, for which he paid Badere $1,000, and he advanced to the company, subject to the check and control of Badere, the sum of $5,000. Goodrich went east again and Badere assumed the control of the company's affairs, a general store having by this time become a part of their scheme. He continued as such manager until March 30, 1907, when he was removed at a special meeting of the board of trustees, Mrs. Goodrich having in the meantime taken an assignment of enough stock to qualify her to vote at the meeting.

It does not appear that Badere rendered services of any

value to the company while engaged as manager. It does appear that, in violation of an amendment to the by-laws adopted September 14, 1906, providing that "the trustees shall contract no indebtedness whatsoever excepting that which is now due and owing by the corporation and the indebtedness which shall be created in favor of John C. Goodrich, without the unanimous approval of the stockholders, it being the intention of these by-laws to provide for the operations of the company upon a strictly cash basis and not otherwise," he diverted $1,310 of the $5,000 advanced under the contract for purposes foreign to those for which it was to be used, and in violation of his trust and duty had made his brother an agent to select and get options on timber lands, agreeing to pay him, without regard to quality or location, a commission of fifty cents per thousand feet on all options he could obtain within a year. There are also other incidents of lesser consequence tending to show his disqualification to manage the company and his indifference to his contract. Upon this state of facts, Goodrich justifies his ouster of Badere from the management of the company.

At the time Goodrich took over the affairs of the company, there were debts aggregating between $22,000 and $23,000. About $7,000 to a bank, secured by mortgage, and about $16,000 to Goodrich. On September 7, 1908, Goodrich notified Badere that "in order to pay up the indebtedness owing by the company it seems necessary that the stockholders shall contribute thereto, otherwise we cannot tell what course the creditors will pursue . . . . . I . . . . therefore pass the matter up to the stockholders in order to have action as to whether the remaining stockholders will make payment in order to clear this property." At the same time appellant was notified that the holder of the first indebtedness would accept $1,920.08, being $1,660.27 on the principal and $259.81 interest to October 1, 1908, and take a new note and mortgage for $7,000; that there was cash in the treasury sufficient to meet a part of this demand so that

the balance would be $972.44, which, prorated according to the stock holdings, would make appellant's part $458.91; and that the other stockholders were ready and willing to pay their pro rata share.

Both of these demands were rejected by Badere, he assigning as a reason that it was the duty of the president to finance the company. Thereafter the property was sold in a bankruptcy proceeding under an order of the Federal court. Goodrich became the purchaser of the property. This action was then brought to recover damages; Badere resting his claim therefor upon the alleged destruction of the value of his stock, and for certain sums which it is alleged would have accrued to the company had the management of the company been left to him, the aggregate damages alleged to have been suffered being $250,000. The case went to trial before a jury, and from a judgment of nonsuit, Badere has appealed.

The gravamen of appellant's charge is that respondent John C. Goodrich, who for convenience will be referred to as respondent, and his attorney, for the purpose of enabling respondent to acquire a majority of the stock of the corporation and with the intent to cheat and defraud the appellant, induced him to sell the 100 shares carrying the control, by falsely representing that the clause in the contract providing that appellant should be the manager was a valid and an enforcible contract, and that the appellant believed and relied upon this representation to his undoing.

Appellant testified that he signed the contract against his will; that he insisted upon consulting with his attorney and upon having him present; that this privilege was denied him; that respondent's attorney told him that it was "all right" and "perfectly square" between the parties; that he relied upon these statements, which he colors as coercive, and signed the contract not knowing it was against public policy and void.

It seems to have been conceded by both parties in the trial below and in the original briefs here that the contract

was void as against public policy, upon the authority of *Hampton v. Buchanan* 51 Wash. 155, 98 Pac. 374; *West v. Camden*, 135 U. S. 507; but by supplemental brief appellant seeks to show that, because all of the stockholders were parties to the contract, it is to be distinguished from the cases just cited and is enforcible. *Kantzler v. Bensinger*, 214 Ill. 589, 73 N. E. 874; *Borland v. Prindle, Weeden & Co.*, 144 Fed. 713; *Lorillard v. Clyde*, 86 N. Y. 384; Alger, Law of Promoters etc., 247. But whether against public policy or not seems to us to be immaterial to the main issue. We find nothing in the record to indicate a fraudulent design on the part of respondent to secure control of the company. Notwithstanding the assertion of appellant that respondents' attorney rushed him into signing the contract, it affirmatively appears that the writing was simply a culmination of the negotiations of the parties running over several months, and that appellant was the solicitous party.

"I told him—he had already been familiar with this property once before, probably a year before. This same proposition had been put before him by my brother, possibly a year before. . . . Now, then, he went away, and was gone some six or seven months, to the best of my recollection. In the meantime, we had incorporated our corporation, and had gone up on the hill, and had opened up this slope. . .

"Q. He was anxious to get the control? A. There was reasons why; he has got that $1,000 control. Q. He was anxious to get that? A. Who was? Q. Mr. Goodrich? A. To get the controlling interest? I think he was. Q. He was very anxious to get that? A. I think he was. Q. You had been talking over with him some days previous to that with reference to it? A. At different times. Q. And the question of your selling him the control of the company had been talked over some two or three weeks prior to this time? A. Oh, I could not recall just the time. Q. At least some days prior? A. Yes, we talked. Q. You had been threshing out the whole details? A. We had, from the time I went to see him in the Stander hotel, when I got him interested to take hold with us. Q. And he told you he would not put up any more money unless he got the control? A. There was no re-

marks made about the control especially, any more than he thought he would like to have the control; that was all. It was not threshed out in excess like that. He thought he would just like to have the controlling interest."

Appellant had every opportunity to repudiate the contract; he was not compelled to sign it. The testimony shows that, after it had been executed and a copy carried away by him, he returned and had it corrected to meet his views. Furthermore, in strict accord with the contract, respondent paid him $1,000 in payment of the 100 shares, and put him in complete charge with $5,000 subject to his check. It was not until appellant's mismanagement and incapacity became apparent that he was ousted. He was not ousted because the contract was illegal. If that had been the design, he might have been ousted long before, but it was because he was running the business in defiance of his authority.

The whole conduct of the parties shows that there was no coercion or fraud, or even preconceived intent of obtaining anything from appellant for less than its value. The concern of the parties seemed to be rather that the business should be done on a cash basis and according to the by-laws or direction of the trustees. This was not done, and the majority asserted its right to take over the management. This it had a right to do. Where a contract of employment is made of the character of the one now before us, its obligations must be held to be mutual, and unless the employee fulfill his covenant, the majority stockholders are not bound to sit by and see their property diverted, debts accumulated, and questionable contracts saddled upon the company. The good of the property should be the first concern of each party.

A minority of the court believe that appellant is entitled at least to recover the value of the 100 shares which was made over to respondent to give control of the company. It is contended that, to that extent, the consideration of the contract failed. Our judgment, on the other hand, is that such recovery cannot be had. Appellant was not fraudulently

induced or coerced in giving up his stock. He was paid what at the time seemed full value. Within the prior sixty days appellant had purchased ¼, or 825 shares, for $6,000, or $7.25+ per share, and 825 shares for $8,000, or 9.69+ per share. As illustrative of the character of the testimony relied on to show value, we shall quote the testimony of John Badere, who owned and sold one-fourth of the stock for $8,000. He says:

"Q. You sold a quarter interest for $8,000? A. Yes, sir. Q. And at that time the company owned the ranch? A. Yes. Q. And also the sawmill. A. Yes. Q. And yet with the ranch and the sawmill and this so-called coal land, you sold out your interest in the whole thing on a basis of $32,000 for the whole business, and yet you come here today and tell this jury that that 486 acres of coal land alone is worth $700,000? A. It is. Q. And yet you sold your interest in your coal land which was worth $200,000, you sold it for $8,000? A. Yes, sir."

But if it be conceded that he could recover, his recovery would be the value of the stock at the time of its conversion. Having already obtained this, no action would lie. If appellant is entitled to recover anything, it would be for the value of all his stock (the company being defunct), for the only theory upon which a recovery could be had, either for the value of the 100 shares or the whole number of shares, would be that he has been defrauded by respondent. This, we all conclude, has not been shown.

It is true that appellant and his witnesses estimated the property to be worth $250,000 and more, but these estimates were too vague and speculative to support a verdict. The only testimony which rises to the dignity of evidence as to the value of the coal lands is that of one Hill, a mining engineer called by appellant, who was familiar with the property at the time. He makes its value wholly problematical, the sum of his testimony being:

"Q. You, as a matter of fact, dont know whether there was a vein of coal in there at all, do you? A. I just considered

it was worth prospecting; that the property was worth prospecting at the time I saw it."

It would be inequitable indeed to allow one who had sold his property at a fair price, and who had brought about present conditions by a breach of his own obligations, to sell his stock over again at a speculative price. The record is silent as to any collusion or fraud between respondents and the creditors, or as to any mismanagement on the part of the respondents. On the contrary, as we have pointed out, appellant was given an opportunity to pay a small assessment upon his stock, thus procuring an extension of the mortgage. The reason assigned by the appellant for declining to pay his pro rata of the debt, in view of the by-law forbidding the creation of any new indebtedness, is not to his advantage. Nor does his reason upon the witness stand, that he had no money, harmonize with his testimony that the property is of great value. True, he had assigned his 1,650 shares of stock to the respondent as security for the loan of $11,500 to the company. But if the property was then of the value of a half million dollars or more, as he now asserts, it would seem that he would have experienced no difficulty in clearing his stock and securing a new loan. At least he could have made an effort to that end. Enough has been said to force the conclusion that there was no fraud shown. It may be said that if the employment clause of the contract is not against public policy, the question of damages might accrue upon the issue of wrongful discharge. But appellant does not prosecute his action upon that theory. The corporation is not made a party, and respondents would not in any event be liable for such damages. But if it be held otherwise, respondent or the corporation would not be liable unless the discharge was arbitrary and without cause (26 Cyc. 988; *Nelson v. Pyramid Harbor Packing Co.*, 4 Wash. 689, 30 Pac. 1096); the rule in such cases being that if cause for dismissal be shown there can be no recovery upon the contract, the right to recover being upon *quantum meruit* for

the service rendered up to the time of the discharge. *Hunter v. Litterer & Cabler*, 1 Bax. (60 Tenn.) 168; *Hewitt v. Roudebush*, 24 La. Ann. 254; *Alberts v. Stearns*, 50 Mich. 349, 15 N. W. 505. Cause for the discharge of appellant being shown by the evidence, it follows that it affords no basis for a cause of action either in law or equity. Indeed, the record shows that appellant has been thrice nonsuited; so that, under any aspect of the case, the judgment of the court was right.

A supplemental brief has been filed in this case, in which additional authorities are cited. Inasmuch as they are offered to sustain the theory that respondents so conducted the affairs of the corporation as to result in a fraudulent conversion of the assets of the company, we are of the unanimous opinion that they cannot be held to apply; for, as we have endeavored to show, that theory is not sustained by the record. For that reason they will need no further discussion.

Finding no error in the record, the judgment is affirmed.

Dunbar, C. J., Mount, and Parker, JJ., concur.

Gose, J. (dissenting)—The appellant charges, that the contract set forth in the majority opinion was obtained by the respondent husband and his attorney for the purpose of enabling the respondents to acquire a majority of the stock of the corporation, with intent to cheat and defraud the appellant, by falsely representing that the clause in the contract providing that the appellant should be the manager of the corporation for one year was a valid and enforceable contract; that the appellant believed and relied upon the representation; that respondent husband, in furtherance of his fraudulent purpose, assigned certain shares of stock to his wife and co-respondent, giving to respondents a majority of the capital stock; that on March 30, 1907, the respondents, who were then trustees of the corporation and owners of a majority of its capital stock, removed the appellant as manager, secretary and treasurer, and took possession of all

the books, money, papers, and effects; that the respondent refused to invest the $5,000 in accordance with the contract; and that the appellant has received no salary since the date of his dismissal from office.

Briefly stated, the testimony offered by the appellant on the question of fraud tends to show that the appellant was induced to sign the contract by the representations of the respondents' attorney that it was "all right; perfectly square," between the parties; that he objected to signing the contract without having his attorney present; that he relied upon the statements of the respondents' attorney, and that he did not know that the contract was against public policy. It seems to be conceded that the clause providing for the retention of the appellant as manager, secretary and treasurer of the company for the period of one year, is against public policy and void, under the rule announced in *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374, and *West v. Camden*, 135 U. S. 507. If the representations of the respondents' attorney, that the contract was "all right," "perfectly square" between the parties, induced the appellant to enter into it, and if he was so induced to believe that the clause providing for his employment as manager for the period agreed upon was a valid engagement, he is entitled to recover damages. *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609; Kerr, Fraud and Mistake, p. 398. See, also, *Bales v. Hunt*, 77 Ind. 355; *Kinney v. Dodge*, 101 Ind. 573; *Evants v. Strode*, 11 Ohio 480.

The question next presented is, What is the measure of the appellant's damages, and how shall they be ascertained? We agree with the majority that there is no fraud shown in the sale of the property in the bankruptcy proceedings, and that there is no evidence that the respondents have mismanaged the corporate affairs. Upon this state of facts, we think that the measure of appellant's damages is the difference between the market value of the one hundred shares of stock at the time the contract was entered into and the sum he re-

ceived for it. *Hazelton v. Carolus*, 132 Ill. App. 512. To that extent the consideration has failed. The contract for services being invalid, he cannot recover for the breach in that behalf. Moreover, to permit him to do so would give him for his stock more than its market value.

The only cause of action disclosed by the evidence is the misrepresentation as to the validity of the management clause in the contract. If the clause were not against public policy, the appellant would be entitled to have his case submitted to the jury upon the alleged breach as to the nonpayment of his salary. Of course, in that event, the respondents could submit evidence as to the cause of his removal, and mitigate the damages by showing his earnings, if any, for the ensuing seven months following his discharge. The appellant offered no evidence as to the value of the one hundred shares of stock at the date of the execution of the contract, but he did show a right to nominal damages. The court, therefore, committed error in granting the nonsuit. The record discloses that the appellant has been thrice nonsuited. I think the parties should be permitted to recast their pleadings, if they so desire, so as to present the single issue as to whether the respondents made the alleged representation, and if so, the reasonable market value of the one hundred shares of stock on the date of the contract. The other issues should be eliminated. I cannot free my mind from the conviction that the majority have decided questions properly triable to a jury, and therefore dissent.

[No. 9513. Department One. June 23, 1911.]

SEATTLE LUMBER COMPANY, *Plaintiff*, v. FRED G. CUTLER *et al.*, *Appellants*, L. A. BORDE, *Respondent*.[1]

MECHANICS' LIENS—RELEASE—CONSIDERATION—EFFECT. A release given by a lien claimant without consideration to enable the owners to transfer property is void as between the parties.

MECHANICS' LIENS — ENFORCEMENT — RELEASE — ESTOPPEL. The giving of a release from all liability for labor performed or materials furnished, for the expressed purpose of enabling the owner to transfer property which was subject to a mechanics' lien, does not estop the lien claimant from asserting the lien against the purchasers of the property, where the purchasers did not rely upon or know of the release and the same was given without consideration.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 4, 1910, in favor of the cross-complainant, establishing and foreclosing a mechanics' lien, after a trial before the court. Affirmed.

Alexander & Bundy (*Milo A. Root*, of counsel), for appellants.

Herchmer Johnston (*E. N. Sears*, of counsel), for respondent.

PARKER, J.—This action was originally commenced to foreclose a number of mechanics' liens against an apartment house in Seattle, now owned by Fred G. Cutler and wife. The only claim of lien here involved is that of L. A. Borde, who furnished the heating plant and plumbing for the building. This controversy arises upon the cross-complaint of Borde, setting up his claim of lien and asking foreclosure thereof, and the answer thereto of Cutler and wife, the present owners of the property. A trial resulted in a decree establishing and foreclosing this lien, among others. Cutler and wife have appealed from so much of the decree as establishes and forecloses Borde's lien.

[1]Reported in 116 Pac. 1.

Prior to November 20th, 1909, the legal title to the property sought to be charged with this lien was in C. J. Sullivan and wife, one H. W. Fisher having some equitable title therein. In pursuance of a contract entered into in May, 1909, with Sullivan and Fisher, respondent Borde furnished and installed the heating plant and plumbing in the building, which was completed before November 20, 1909. Prior to that date, appellant Fred G. Cutler had negotiations with Fisher, resulting in an agreement for the purchase of the property from Sullivan and Fisher. When it came to the consummation of this purchase, some question arose as to the existence of the lien of respondent against the property by reason of his furnishing the heating plant and plumbing in the construction of the building. Appellants became satisfied, from information then furnished by Fisher in the form of a purported receipt in full from respondent, and also from a telephone communication which he claims he then had with respondent, that respondent's claim was fully satisfied, and on November 20th completed the purchase of the property and received the deed therefor. The evidence, we think, clearly shows that there was actually due to respondent at this time upon this contract for the heating plant and plumbing the sum of $3,041.05. The decree was rendered in his favor for that sum with interest.

The principal contention of counsel for appellants is that respondent is estopped from setting up his claim of lien against them, because of his placing in Fisher's hands the receipt acknowledging full payment of his claim, and also acknowledging the genuineness of such receipt in the telephone communication with appellant just before the purchase of the property by appellants, knowing that they were about to purchase it. This contention involves only questions of fact touching the genuineness of the purported receipt produced by Fisher, and the occurring of the telephone conversation between Cutler and respondent. The trial judge did not make formal findings of fact, but it is clear from his

remarks at the conclusion of the trial that he believed the receipt to be a forgery, and that if such a telephone conversation occurred as testified to by Cutler, it was not with respondent, though Cutler may have thought he was then talking to respondent over the telephone. It was evidently upon this theory that the decree was rendered in respondent's favor. A careful reading of all of the evidence convinces us that the trial court was fully warranted in taking this view of the purported receipt and telephone conversation. We will not attempt to review the evidence in detail touching these matters, since we see no useful purpose to be served thereby. It, of course, follows that respondent was in no way bound by the purported receipt and telephone conversation, and therefore his lien was not affected thereby.

It is further contended by counsel for appellants that respondent cannot maintain his lien by this action, because of a certain written release executed to Sullivan and wife by him, which, after referring to his contract and describing the property, recites:

"Whereas, the said Celestine J. Sullivan and wife are about to sell and transfer the said property, and for that purpose desire a release from the undersigned of all liability and obligations upon said contract;

"Now, Therefore, the undersigned, L. A. Borde does hereby in consideration of the premises release and forever discharge the said Celestine J. Sullivan and his wife, Evelyn Sullivan, from any and all liability and obligation of every kind whatsoever on account of said contract, and on account of any labor performed or materials furnished on account of said building by the undersigned.

"Dated this 20th day of November, 1909.

"L. A. Borde."

It is quite clear from the evidence that this paper was executed without any consideration whatever passing from Sullivan and wife to Borde. Hence, as between him and the Sullivans, we are unable to see that it has any validity. Assuming that this paper was executed to enable the Sullivans,

who had the legal title to the property, to show their purchaser that the lien of respondent had been satisfied, we are then met with the fact the paper was never used for that purpose; for it was beyond question that neither Cutler nor his wife ever heard of this paper until about the time of the trial of this cause, long after they had purchased the property. They were, of course, in no way influenced by it at the time of the purchase. Hence, it did not work an estoppel in their favor as against respondent's right to his lien. *Washburn v. Kahler*, 97 Cal. 58, 31 Pac. 741.

Counsel for appellants argue that this paper is, in effect, a release of personal liability of Sullivan and wife, and hence, releases the lien. We have noticed that it, being without consideration, did not result in releasing Sullivan and wife of their obligation to respondent, and we think its terms are not sufficiently clear in evidencing an intent to release the lien as to make it effective in that regard, aside from the want of consideration. 27 Cyc. 262; *Holm v. Chicago, Milwaukee & P. S. R. Co.*, 59 Wash. 293, 109 Pac. 799; *Pacific Lumber & Timber Co. v. Dailey*, 60 Wash. 566, 111 Pac. 869.

We are of the opinion that the trial court correctly determined the rights of the parties. The judgment is affirmed.

DUNBAR, C. J., GOSE, MOUNT, and FULLERTON, JJ., concur.

[No. 9216. Department One. June 26, 1911.]

FRED REHLOW, *Respondent*, v. NICHOLAS SCHMITT *et al.*, *Appellants*.[1]

PLEADING—COMPLAINT—DEMURRER. A complaint for the breach of a written contract of employment at a specified sum per month is not subject to a general demurrer for want of sufficient facts to state a cause of action, from the fact that it also alleges a contemporaneous oral agreement to advance expense money, evidence as to which might have been inadmissible as varying the terms of the writing.

APPEAL—RECORD—STATEMENT OF FACTS—EVIDENCE—REVIEW. An assignment of error in the admission of evidence varying the terms of a written contract will not be considered on appeal where the evidence is not brought up in the record by bill of exceptions or statement of facts, and the judgment might have been sustained by other competent evidence.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 28, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

John R. Parker and *Nicholas Schmitt*, for appellants.

Percy Gardiner, for respondent.

PARKER, J.—The plaintiff commenced this action to recover for services rendered and expenses incurred in connection therewith, upon facts alleged in his complaint in substance as follows: The plaintiff and defendant Nicholas Schmitt, acting for the community, entered into a written contract as follows:

"Seattle, Sept. 7th, 1909.

"It is hereby agreed by and between Nicholas Schmitt, party of the first part, and Fred Rehlow, party of the second part.

"That the party of the second part agrees to perform manual labor on Hat Island for the party of the first part, and be paid therefor the sum of thirty dollars ($30)

[1]Reported in 116 Pac. 267.

per month, for the months of September, October, November, December, January, February and March, to be paid as follows: Fifteen dollars ($15) each month and the balance due on the 1st day of March, 1910.

"(Signed) Fred Rehlow
"Nicholas Schmitt."

At the time of the making of this written contract, and in connection therewith, it was agreed between the parties verbally that the defendant should pay to the plaintiff a reasonable sum monthly for his expenses during the life of the contract. The reasonable amount of such expenses incurred by the plaintiff was $15 per month. The plaintiff entered upon the performance of his work under the contract, and the defendants have wholly failed to perform their part thereof, and have failed to pay the plaintiff the compensation and expenses as agreed. On or about the 18th day of December, 1909, the defendants, without any just cause therefor, ordered the plaintiff to discontinue the work and ejected him from the premises, and notified him that they would be no longer bound by the contract. The plaintiff has at all times been willing to perform his part of the contract. He prayed for judgment in the sum of $315 against the defendants. This complaint was demurred to upon the sole ground that it did not state a cause of action. The demurrer being overruled, the defendants answered, when a trial followed, resulting in findings and judgment in the plaintiff's favor in the sum of $151.50. From this judgment, the defendants have appealed.

The principal contention of counsel for appellant is that the trial court erred in overruling the demurrer and in admitting evidence upon the question of respondent's expenses. Their argument is that the court's action in this regard was in violation of the rule against admitting oral evidence to vary the terms of a written contract. This argument seems to be directed to the overruling of the demurrer as well as admission of the evidence upon the trial. We are unable to

see how this question has any bearing upon the alleged error of the court in overruling the demurrer. We have noticed that the demurrer was general and directed only to the insufficiency of the complaint in stating a cause of action. Whether or not oral evidence was admissible to prove the expenses incurred by respondent we think would not affect the question of the complaint stating a cause of action. The contention involves nothing but a rule of evidence. It seems clear to us that the complaint states a cause of action. As to what evidence may be admissible in support thereof, in the light of the rule excluding oral evidence offered to vary a written contract, is immaterial upon the question of the complaint stating a cause of action.

As to the admissibility of the evidence claimed to have been erroneously admitted by the court, we are unable to express any opinion, because none of the evidence is before us. The record contains no bill of exceptions or statement of facts, so we are unable to say whether or not the court committed error in this regard. We have noticed that the judgment is for only $151.50. There may have been ample evidence to support the judgment in this amount under the written contract alone. Other assigned errors would not affect the result, so they do not call for discussion.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9016. *En Banc.* June 26, 1911.]

Noble G. Harvey, *Appellant*, v. Northern Pacific Railway Company, *Respondent*.[1]

Waters and Water Courses—Surface Waters—Floods—Protection Against—Liability. Flood waters overflowing the banks of a stream are surface waters, an outlaw and common enemy, against which a riparian owner may protect itself by turning the same back into the stream; and if a lower proprietor is thereby injured by eddies and currents different from the natural flow of the stream, it is *damnum absque injuria*, for which no recovery can be had.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 17, 1910, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

John W. Miller and *Robert McMurchie*, for appellant.

Geo. T. Reid, *J. W. Quick*, and *L. B. da Ponte*, for respondent.

Crow, J.—This action was commenced to recover damages resulting from an alleged discharge of water upon plaintiff's lands. The trial judge sustained a demurrer to the amended complaint. Plaintiff refused to plead further, and has appealed from an order of dismissal.

The following plat is attached to the amended complaint, and by proper allegations made a part thereof:

[1]Reported in 116 Pac. 464.

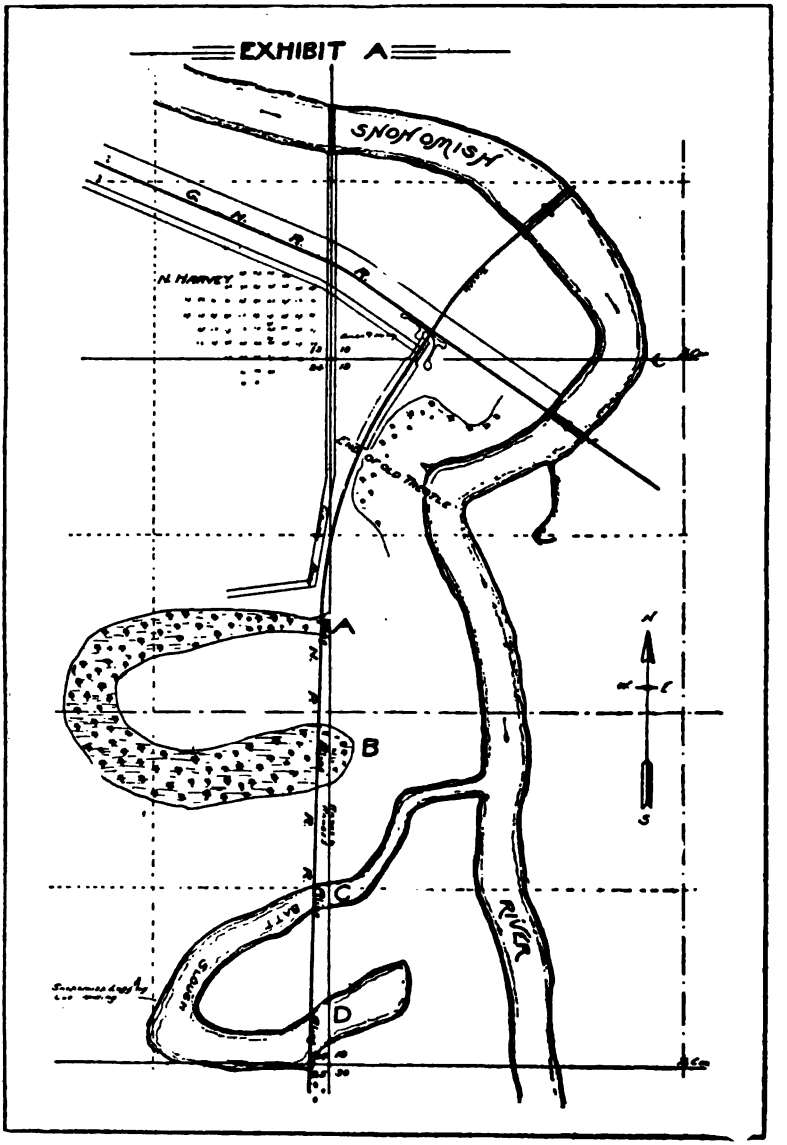


EXHIBIT A
SNOHOMISH
G. N. R. R.
N. HARVEY
A
B
C
D
RIVER

The amended complaint alleges:

"That ever since the 15th day of October, 1892, the plaintiff has been, and now is, the owner and in possession of the following described real estate, situated in the county of Snohomish, state of Washington, to wit: (description of twenty acres.)

"That about five hundred (500) feet to the east of said described tract of land is the right of way of the defendant, over which there is built a railroad, now, and at the time of the damage hereinafter complained of, owned by the defendant.

"That the map or plat hereto attached, marked Exhibit 'A' and made a part hereof, correctly shows the location of the lands of the plaintiff hereinbefore described, the location of the railroad of the defendant, the location of the railroad owned by the Great Northern Railroad Company, and location of the Snohomish river, which flows in a general northerly and north-easterly direction through the lands shown on the east side of said plat, and thence in a westerly direction through the lands shown on the north side of said plat.

"That lying in a general westerly direction from the lands shown in said plat, and including the same, is a large river bottom many miles in extent . . . commonly known in the local vicinity as 'The Marsh.'

"That along the bank of the Snohomish river there exists a sort of rim, varying from two hundred and fifty (250) to fifty (50) yards in width, which is higher than that portion of the bottom land farther from the river, excepting at certain points, where said rim is broken by natural water courses running into said river.

"That for more than sixty (60) years past, the Snohomish river has been subject to floods at frequently recurring intervals, at which time the waters of said river escaping from the ordinary channel and overflowing its banks, spread over the said bottom land to a depth of about two feet to six feet, continuing to flow in the same general direction as the waters in the ordinary channel of said river to its mouth, and such portions thereof as do not flow over the rim, are discharged into the channel of the river when the flood subsides, through numerous natural water courses and channels, carrying and draining themselves into the river.

"That in times of flood, sufficient to overflow said bottom lands, the waters of said Snohomish river have been accustomed to leave its banks at points thereon, easterly and southerly from where the track of said defendant crosses said bottom lands, and are distributed over practically the entire area of said bottom, and flow with an easy current.

"That for a long time prior to the filling in of the trestles hereinafter described by the railway of the defendant over said bottom lands, the Great Northern Railroad Company did maintain, and ever since has maintained its track over said lands where the same is now located, upon an embankment, composed of earth, sand, gravel and rock, substantially the same as at the present time.

"That the tracks of the defendant crossing said bottom land were originally built partly on an embankment and partly on a trestle, the embankment and trestle being substantially from ten to twenty feet in height; that there was a trestle from the south bank of the Snohomish river to a point about eight hundred (800) feet south of the track of the Great Northern Railroad Company, marked on the plat hereto attached, and hereinbefore referred to, 'end of old trestle'; that there was a trestle of about three hundred (300) feet in length at the point on said plat marked 'A'; a trestle about six hundred (600) feet in length at the point marked 'B' on said plat; a trestle about two hundred (200) feet in length at the point marked 'C' on said plat, and a trestle about six hundred (600) feet in length at the point marked 'D' on said plat; that while said trestles were open, the flood waters of the Snohomish river passed through the same and the flow thereof was not materially interrupted or changed.

"That the defendant has caused its said trestles to be filled at the points marked on said plat 'A,' 'B,' 'C' and 'D,' as aforesaid, and from the point marked 'end of old trestle' to about twenty (20) feet from the embankment of the Great Northern Railroad Company, using to make such fill dirt, sand, gravel, stone and rocks; that the filling of such trestles, forms a dam or barrier across the whole of said river bottom to said Great Northern Railroad, which prevents the waters of the Snohomish river from flowing along their usual and accustomed course over said bottom lands, and turns said waters in a general northerly direction along the east side of said embankment, until it reaches the open space between the

end of such embankment and the Great Northern Railroad, where a powerful eddy is formed, and said waters are ejected in a current of tremendous force through the opening aforesaid, upon the bottom lands aforesaid, and the lands of this plaintiff, hereinbefore described."

The amended complaint further alleges that, in times of high water and overflow, the unnatural current and eddy thus created by appellant has caused and still causes large amounts of gravel and sand to be washed and deposited on appellant's tillable land, to his damage in the sum of $2,500.

The only question before us is the sufficiency of the amended complaint. Respondent insists the overflowing water from which it has protected itself, and of which appellant complains, is surface water, an outlaw and common enemy against which any property owner may defend himself, although in so doing he may cause injury to others, and that such injury is *damnum absque injuria*. Appellant contends under the common law the water is not surface water, but that, if it is, respondent is liable for appellant's damages sustained by reason of its collection upon respondent's lands, and the subsequent discharge upon appellant's land in a quantity greater than, and in a manner different from, its natural flow.

It is apparent from the amended complaint that the water escapes from the banks of the river at times of flood and freshets, and that prior to any interference by respondent, it scattered over a large area of low land belonging to appellant, respondent, and other parties. The question then arises, whether the water thus escaping from the river and flowing over these lands is surface water, or continues to be a portion of the stream. There is an irreconcilable conflict of authority upon this proposition.

"The decisions on the question whether the flood waters of watercourses in times of high water are to be regarded as surface water or water of the watercourse are in conflict. In some jurisdictions waters which overflow the banks of watercourses by reason of the insufficiency of the channel to carry off all the water are declared to be surface waters, and after

flood waters have lost all connection with the watercourse and cannot return thereto as the water subsides, they should, it would seem, be unquestionably considered as surface waters." 30 Am. & Eng. Ency. Law (2d ed.), p. 324, and cases cited, in note 7, including *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859, from this state.

The question is not a new one in this state, and we feel constrained to follow the announcement in *Cass v. Dicks*, which seems to be directly in point. We have not only given the opinion in that case our careful consideration, but have also taken occasion to examine the original record, containing a plat of the land, the river, and the dry slough. From the record and plat, it indisputably appears that the waters of which the plaintiff in *Cass v. Dicks* complained came from the Skagit river during times of flood, escaped from the plaintiff's land, and naturally flowed therefrom over lands of the defendants. The plaintiff was located in a fork of the Skagit river and Dry slough. The defendants, to protect themselves from such escaping water, established a dike from the river bank upon the west to the slough upon the east, immediately south of plaintiff's land. This placed the plaintiff's land in an enclosure bounded by the river on the west and north, the dry slough on the east, and the dike on the south, and prevented the water which escaped from the river onto plaintiff's land from flowing over defendants' lands. The plaintiff was thus compelled to suffer an increased flooding of his lands, or to protect himself by diking or other means. The defendants in *Cass v. Dicks* contended that the water escaping from the Skagit river was surface water, an outlaw and common enemy against which they were entitled to protect themselves, and their contention was sustained. Anders, J., in writing the opinion of this court, first called attention to the rules of the civil and common law relative to surface water, held the common law rule prevails in this state, and speaking further of surface water, said:

"By that law [the common law] surface water, caused by the falling of rain or the melting of snow, and that escaping

from running streams and rivers, is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others. The rule is based upon the principle that such water is a part of the land upon which it lies, or over which it temporarily flows, and that an owner of lands has a right to the free and unrestrained use of it, above, upon and beneath the surface. 24 Am. & Eng. Enc. Law, pp. 906, 917; Angell, Watercourses (7th ed.), § 108 o. If one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is *damnum absque injuria*. Mr. Angell, after quoting from a leading Massachusetts decision, observes: 'It makes no difference in the application of this rule that land is naturally wet and swampy. A conterminous proprietor may change the situation or surface of his land by raising or filling it to a higher grade, by the construction of dikes, the erection of structures, or by other improvements which cause water to accumulate from natural causes on adjacent land and prevent it from passing off over the surface. Such consequences are the necessary result of the lawful appropriation of land, whatever may be its nature, and although they may cause detriment and loss to others.' And Mr. Gould, in § 263 of his excellent work on Waters (2d ed.), says: 'By the common law no rights can be claimed *jure naturae* in the flow of surface water, and its detention, expulsion or diversion, is not an actionable injury, even when injury results to others.' And in § 275, he further says: 'The owner of land may erect barriers upon it to prevent the influx of surface water whether collected in artificial channels or not, and if such water is set back or turned aside upon the land of another, to his injury, it affords no cause of action.' Mr. Weeks lays down the law on this subject as follows: 'If a land owner whose lands are exposed to inroads of the sea, or to inundations from adjacent creeks or rivers, erects sea-walls or dams, for the protection of his land, and by so doing causes the tide, the current, or the waves to flow against the land of his neighbor, and wash it away, or cover it with water, the landowner so causing an injury to his neighbor is not responsible in damages to the latter, as he has done no wrong, having acted in self-defense and having a right to protect his land and his crops from inundation.' Weeks, Damnum Absque Injuria, pp. 3 and 4."

It was thus held that the plaintiff was without remedy, and that for his protection against the floods and sudden freshets he should rely upon his own exertions, by diking or other proper means. The appellant here contends that *Cass v. Dicks* was, in effect, overruled by the later case of *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869, and materially distinguished in *Noyes v. Cosselman*, 29 Wash. 635, 70 Pac. 61, 92 Am. St. 937. In *Peters v. Lewis* the defendant erected buildings on his city lot so that their roofs collected waters in gutters and discharged the same in a body upon plaintiff's adjoining premises. It was held the defendant had no right to thus collect surface water on his own premises and discharge it upon the land of another. Respondent does not contend it can collect water on its right of way by a ditch or other means, and discharge it on appellant's premises; nor does it contend it may lawfully create an artificial pool or collection of water upon its premises and precipitate the same upon its land and discharged the same in a large volume or upon the land of another. It has not collected the water by a rapid current upon appellant's land. It has raised its own premises so as to dike against and prevent the flow of surface water thereon. It has protected itself and prevented the invasion of its premises by the flood water of the stream. If thereby the water, which we hold to be surface water, is turned back and prevented from flowing over its land to appellant's injury, the case is one of *damnum absque injuria*. The surface water now meets the embankment and proceeds with the natural course of the stream. In other words, it is temporarily returned to the stream, and all the respondent has done is simply to protect its property from the overflow water which would otherwise leave the natural channel of the stream. The doctrine announced in *Cass v. Dicks* is not inconsistent with the later case of *Noyes v. Cosselman*, *supra*, but is approved therein, although distinguished as not applicable to the particular facts of that case. On the authority of *Cass v. Dicks*, we therefore hold the water of which

appellant complains is surface water, an outlaw and common enemy against which respondent is entitled to protect itself, by an embankment or otherwise, and against which the appellant must also protect himself if he desires to avoid injury.

Appellant further contends that, even though the water causing this damage be held surface water, the respondent is nevertheless liable for such damage, because it has collected and diverted such water from its usual course, and discharged it upon appellant's land in a quantity greater than, and in a manner different from, its natural flow. This contention cannot be sustained. Respondent has not collected the water on its right of way and thereafter discharged it upon appellant's premises. It was entitled to protect itself against the water escaping from the banks of the river, and could only do so by some method which would prevent it from flowing upon and over its lands, and this it did. When prevented from flowing upon respondent's land by the embankment, the water necessarily continued its flow along the general course of the river until it reached a point where, for want of obstruction, it was discharged upon appellant's land. Respondent has done nothing further than to exercise its common law right of protection against surface water. It is to be presumed that appellant may do the same. The allegations of his amended complaint do not show that he has done so, and any injury he may have suffered is regarded under the law of this state as *damnum absque injuria.*

The judgment is affirmed.

Mount, Morris, Gose, Ellis, and Parker, JJ., concur.

[No. 9338. Department One. June 27, 1911.]

JOHN FELLOWS, *by Marie Wood, his Guardian etc., Appellant*, v. NORMAN M. BEERS *et al., Respondents.*[1]

MALICIOUS PROSECUTION—MALICE—EVIDENCE — SUFFICIENCY. The evidence is insufficient to support an action for malicious prosecution, where it appears that the defendant, having witnessed an assault and battery by plaintiff upon a third person, stated the facts to the prosecuting attorney and upon his advice swore out a warrant for plaintiff before a justice of the peace; any inference of malice from the fact that the justice discharged the plaintiff, who was manifestly guilty of an assault and battery, being more than overcome in such case.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 9, 1910, in favor of the defendants, upon withdrawing from the consideration of the jury an action for malicious prosecution. Affirmed.

H. E. Foster, for appellant.

Arthur E. Griffin, for respondents.

PER CURIAM.—The appellant, plaintiff below, instituted this action, through his guardian *ad litem*, to recover damages for an alleged malicious prosecution. On the trial, at the conclusion of his evidence, the court took the case from the jury and entered a judgment for the defendants. The correctness of this ruling of the trial court is the question presented on this appeal.

The evidence in the record tends to show that the defendant Norman M. Beers, while at the residence of his co-defendants, witnessed an assault and battery made by the plaintiff, who was then within two months of nineteen years of age, on the defendant Mrs. Sloan. According to Mr. Beers, who was called as a witness by the plaintiff, the assault was entirely unprovoked. He testified that Mrs. Sloan

[1]Reported in 116 Pac. 262.

was sprinkling her lawn with an ordinary garden hose when by accident the plaintiff got in the way of the hose and some water was thrown on him, that he thereupon assaulted her viciously, called her vile names, and beat her over the head with a soda water bottle which he had in his hands and from which he had been drinking. Mrs. Sloan was a small woman, somewhat frail, and the act of the plaintiff so outraged the witness' sense of decency that he stated the facts to the prosecuting attorney, who drew a complaint charging him with assault and battery, which the witness verified before a justice of the peace. A warrant was issued on the complaint, and the plaintiff arrested thereunder. On the hearing before the justice of the peace, however, he was discharged.

The plaintiff himself states the facts somewhat differently. He testified that the trouble was started by Mrs. Sloan herself who began by calling him a "hoodlum." That he retorted to this by calling her "an old hen," when she turned the hose on him purposely, and it was then that he struck her with the soda water bottle. The justice of the peace discharged the appellant after only one witness had testified and without hearing the prosecuting witness, or other witnesses brought there to testify for the state. The reason for his action does not appear in this record, the journal entry directing the discharge being admittedly erroneous. There was no direct evidence of malice or of joint action or conspiracy on the part of the defendants, of any character; in fact, it was shown that the prosecution of the plaintiff was instituted by Mr. Beers on his own volition, after he consulted with his codefendants and failed to receive their consent to such a course.

Under these facts, we think the action of the trial judge without error. The plaintiff was manifestly guilty of an assault and battery by his own confession, and any inference of malice that arises from the discharge of the plaintiff by the justice of the peace is overcome by the undisputed evidence showing what occurred at the hearing, and by the fact

that the prosecuting witness stated the facts to the prosecuting attorney and took his advice before beginning the prosecution.

The judgment appealed from is affirmed.

[No. 9364. Department One. June 27, 1911.]

SAMUEL RITTER WILKESON *et al.*, *Respondents*, v. GEORGE L. MILLER, *Appellant*.[1]

EJECTMENT—PLEADING — COMPLAINT — TITLE AND POSSESSION. A complaint to recover the possession of real estate, setting forth the nature of plaintiffs' title, as required by Rem. & Bal. Code, § 793, is sufficient without alleging that the plaintiffs were seized and possessed of the premises within the statutory period for commencing the action.

ACTIONS—MISJOINDER OF CAUSES—QUIETING TITLE—EJECTMENT. It is not a misjoinder of legal and equitable causes of action to sue to quiet title to several tracts, and to recover possession of part thereof in the possession of the defendant.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered June 8, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

J. W. A. Nichols, for appellant.

E. R. York, for respondents.

FULLERTON, J.—This is an action brought to recover the possession of real property. In their complaint the plaintiffs alleged title in fee to the property in themselves, deraigned through mesne conveyances from the United States of America; that they were entitled to the possession of the property; that the defendant was wrongfully in possession of

[1]Reported in 116 Pac. 268.

a part thereof (describing it), holding without right, title, or color of title, and wrongfully and unlawfully claimed title to, and interest in, and right of possession of, the whole of the property described; that they had demanded possession of the property from the defendant, but that the defendant had refused to deliver up or surrender the property to them; and that they had been damaged by the withholding of possession on the part of the defendant in the sum of $100. In the prayer to the complaint the plaintiffs asked for a judgment awarding them possession of the property, that their title thereto be quieted, and that they have judgment in the sum of $100 as damages for the wrongful detention of the property by the defendant.

A demurrer was interposed to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action, and that several causes of action were improperly united therein. The demurrer was heard and overruled by the court, whereupon the defendant answered, putting in issue the allegations of the complaint and setting up new matter as an affirmative defense. To the answer a reply was filed, and on the issues thus made a trial was had, which resulted in a judgment in favor of the plaintiffs. This appeal followed.

But one question is suggested by the record: namely, did the court err in overruling the demurrer. It is argued first that a complaint to state a cause of action for the recovery of real property must allege: "that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action," and that the complaint here contains no such allegation. The language above quoted is taken from the code prescribing the limitations for the commencement of actions for the recovery of real property, and although somewhat different from the ordinary statute in such cases, has never been thought to require a different form of the allegation setting forth the interests of the plaintiff than that commonly

used. In fact the code elsewhere makes it sufficient, in an action to recover possession and quiet title to real property, for the plaintiff to set forth in his complaint the nature of his estate, claim, or title to the property in question. Rem. & Bal. Code, § 793. And under this section we have repeatedly held complaints in the form followed by the plaintiffs in this instance sufficient. Moreover, this precise question was before this court in the early case of *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648, concerning which it was said:

"The argument of the respondents upon the first proposition is that it nowhere appears from the complaint that the plaintiffs were seized or in possession of the premises within ten years next prior to the commencement of the action. Their contention in that behalf is that under the peculiar wording of our statute it is necessary to allege actual possession of the premises within the statutory period whether or not any other person is shown to have been in adverse possession thereof. The allegations of this complaint show that the ancestor of these plaintiffs died seized and possessed of the premises, but there is no allegation that these plaintiffs or any of them had ever been in possession thereof. Conceding for the purpose of the discussion of this question, that the allegation that these plaintiffs were the heirs of such deceased party established their capacity to sue, we think the allegation as to possession was sufficient. In our opinion our statute of limitations is like that of most of the other states, one of adverse possession, and under it the rightful owner of real estate is seized of the same, whether or not he is in actual possession thereof, unless the same is in the actual adverse possession of some other person. This being so, it follows that when ownership and seizin is once shown it will be presumed to have continued until such presumption is overcome by allegation and proof of adverse possession in some one else. The fact was sufficiently alleged that the ancestor had been seized of the premises and until something appeared to overcome the presumption of such seizin, it would have force in behalf of such ancestor, or those holding under him."

The lands were described in the complaint in accordance with the government surveys and contained some four differ-

ent legal subdivisions, while it was alleged that the defendant was in actual possession of only a part of one such subdivision although he claimed title to each of the several subdivisions mentioned. Based on this fact, it is contended that several causes of action have been improperly united, since, as it is claimed, ejectment is the remedy against one wrongfully in possession, while an action to quiet title under the code is the remedy for wrongful and illegal claims of interest in property. But the contention, while it may find support in the earlier decisions of the court, was determined adversely by this court in *Carlson v. Curren*, 48 Wash. 249, 93 Pac. 315. We there held that it was not a misjoinder of legal and equitable causes of action to sue for a recovery of the part of the land of which the defendant was in possession and to quiet title against his wrongful and unlawful claims to the whole; this, on the principle that equity, having jurisdiction for one purpose, may do complete justice between the parties.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9475. Department One. June 27, 1911.]

AMERICAN MILL COMPANY, *Respondent*, v. THE CITY OF MONTESANO, *Appellant*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—MATERIALS FURNISHED—ACTIONS—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that lumber was used in the construction of a plank road for a city, where it appears that it was ordered for that express purpose, that it was carried to the city by the contractor, and that the lumber actually used was of the same character; especially in the absence of any evidence that it was not the same lumber.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 23, 1910, in favor of the

[1]Reported in 116 Pac. 257.

plaintiff, after a trial on the merits before the court without a jury, in an action to recover for materials furnished to a city contractor. Affirmed.

O. M. Nelson, for appellant.

Bridges & Bruener, for respondent.

FULLERTON, J.—Some time prior to the month of October, 1909, the city of Montesano entered into a contract with the Montesano Planing Mill Company, by the terms of which the latter company agreed to replank and otherwise repair for the city a certain elevated roadway, the same being a public highway of the city, and the work to be done thereon being public work. In letting the contract the city failed to exact from the contractor a bond conditioned for the faithful performance of the work and for the payment of materialmen and others who should furnish materials and supplies to the contractor for carrying on the work, as required by the act of the legislature of March 18, 1909. Laws 1909, p. 716; Rem. & Bal. Code, § 1159 *et seq.* The contractor entered upon the performance of the work, and in the course thereof purchased of the respondent, during the months of October and November, 1909, lumber to be used in the construction of the plank way of the value and at the agreed price of $863.40. The lumber was delivered to the contractor and by him carried to the place of work. The contractor, however, failed to pay for the lumber so furnished, and, being bankrupt, this action was begun against the city of Montesano to recover the value thereof. On the trial the city conceded its liability for any material remaining unpaid for that was actually used in the construction of the roadway and for the furnishing of which it had received due notice, but defended on the ground that the material sued for had not been used by the contractor in the construction of the way, or that, if it had been so used, it received no notice to that effect. Judgment went against the city for the full amount claimed, and this appeal followed.

The city, in this court, relies for reversal on the sole ground that the evidence fails to show that the material sued for was actually used in the construction of the roadway, or was delivered on the ground for use therein. But we think the evidence ample in these respects. It was shown that in ordering the lumber the representative of the contractor expressly stated that it was to be used in the construction of the plank road, and that it was this fact that induced the respondent to deliver the lumber without an advance payment; that the lumber was planking suitable for the purposes intended; was actually carried to Montesano by the contractor; and that the lumber used in the construction of the bridge was of the same character as that furnished by the respondent. While it is true that the representative of the respondent who made the sale was not able to say that he knew as a matter of fact that the lumber furnished by his concern was actually used by the contractor in the construction, we think the facts given in evidence warranted that conclusion, especially in the absence of evidence to the contrary.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9489. Department One. June 27, 1911.]

F. D. NOWELL *et al.*, *Respondents*, v. SEATTLE TRANSFER COMPANY, *Appellant*.[1]

WAREHOUSEMEN—RECEIPTS. An instrument in writing signed by the agent of a warehouseman, describing freight so as to identify it, stating the names of the owners, terms of storage, and promising a delivery upon surrender of the writing, is a warehouse receipt, within Rem. & Bal. Code, § 3369.

WAREHOUSEMEN—RECEIPTS—LOSS OF GOODS — DEFENSES — ESTOPPEL. A warehouseman who issued a warehouse receipt in exchange

[1]Reported in 116 Pac. 287.

for a railroad delivery order without obtaining possession of the goods, as required by Rem. & Bal. Code, § 3369, cannot evade liability for the loss of the goods, where it retained storage charges for two years, knowing that the goods were lost and never in possession, and not notifying the owners of the loss.

BAILMENT—PLEADINGS—AMENDMENTS. In an action by bailors to recover the value of goods lost by a bailee, it is not error to allow the complaint to be amended to allege that the plaintiffs were the owners of the goods.

APPEAL—REVIEW—HARMLESS ERROR. In an action by bailors for the value of goods lost, it is harmless error that judgment was rendered in favor of both plaintiffs when the evidence showed that only one of them was interested in the goods.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 30, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

James B. Metcalfe, for appellant.

F. C. Kapp, for respondents.

GOSE, J.—Early in April, 1907, the respondent F. D. Nowell shipped from Alaska two crates containing copper plates, to F. H. Nowell at Seattle. The freight was carried by the Alaska Steamship Company, and delivered to the Northern Pacific Railway Company at Seattle. On April 9, the railway company received the goods and paid the freight. On the same day, the respondent F. H. Nowell paid to the railway company the freight, together with the wharfage charges, and received a receipt or delivery order which entitled the holder to the goods upon its presentation. The appellant, a warehouseman, in exchange for the receipt or delivery order, issued to the respondent its receipt, bearing date April 10, 1907, as follows:

Order on Warehouse.	Number
Warehouseman:	Date 4-10-1907
Please { ship / deliver } to F. D. & F. H. Nowell	Notice Warehouseman will comply with special instructions as checked (X) below and return to office.
Marked (N)	
Articles	Take up Shipper's Bill of Lading and turn in office.
2 Crt. Co. Plates	Attach Shipping Receipt to papers and return.
	Collect upon delivery $———
	Weigh Goods and advise
	Ship today

This receipt must be surrendered to obtain goods storage @ 25c Pr. Mo.

Account Storage

Received the above goods in good order

The Seattle Transfer Co.

By Moore.

On March 18, 1909, the respondent F. D. Nowell paid the appellant two years' storage charges on the goods. It held this sum until the close of the trial, when it tendered it to the respondents in open court. The respondents, some time after paying the storage charges, made repeated demands upon the appellant for a delivery of the goods. These demands proving unavailing, this suit was commenced for the recovery of the goods or, in case a delivery could not be had, for their value. There was a judgment against the appellant for $500, which it seeks to set aside by this appeal.

The writing which we have set forth, which is the basis of the action, is a warehouse receipt as defined by the provisions of Rem. & Bal. Code, § 3369. It is an instrument in writing, signed by the agent of the warehouseman, describes the freight so as to identify it, states the names of the owners, the terms of storage, and promises a delivery upon the surrender of the receipt. The appellant insists that it cannot be treated as a warehouse receipt, because the goods were not "actually in store" when it was given, as required by Rem. &

Bal. Code, § 3372. As we shall see later, that question is not open to the appellant.

It is next urged that there can be no recovery because the appellant never obtained possession of the goods. The surrender of the expense bill or delivery order was a constructive delivery. 5 Cyc. 165. The appellant cannot escape liability on the ground that it made repeated efforts to get possession of the goods and failed to do so. It not only gave the respondents its warehouse receipt, but lost the delivery order, and failed to notify the respondents for two years succeeding the issuance of its receipt. The appellant, as the learned trial court stated, assumed the responsibility of finding, storing, and re-delivering the goods. Moreover, it admits that it learned, a few days after it gave the receipt, that the goods were not on the dock, and that it permitted the respondents for two years to rest content in the belief that it had the goods in store. Whether it could have called in the receipt after it learned that the goods could not be found, and avoided liability, we need not inquire. It cannot issue its warehouse receipt, lose the written evidence of the right to possession of the goods, remain silent for two years, and then assert that it is not liable because it never had the goods in store.

During the progress of the trial, the court permitted the respondents to amend the complaint by interlineation, alleging that they were the owners of the copper plates. This is assigned as error. The assignment is without merit. It is doubtful whether the amendment added anything to the force of the complaint. As bailors, the respondents could prosecute the suit. However, there was no error in permitting the amendment.

It is also said that the evidence shows that the respondent F. H. Nowell has no interest in the goods, and that as to him the suit should have been dismissed. He was one of the bailors named in the receipt, and the consignee of the goods. If we should, however, assume that error was committed, it

was harmless. It is not important to the appellant whether the judgment was entered in favor of one or both the respondents.

The assignments that the court erred in denying the motion for a nonsuit and for a new trial are also without merit. The value of the goods found by the court is supported by the evidence.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9249. Department One. June 27, 1911.]

PENNSYLVANIA CASUALTY COMPANY, *Respondent*, v. WASHINGTON PORTLAND CEMENT COMPANY, *Appellant*.[1]

INSURANCE—AGENT FOR INSURED—EXISTENCE OF RELATION—INDEPENDENT CONTRACTOR. Where a construction company acted as the agent of the owner for a commission, the owner furnishing the labor and material for the construction of a plant, the owner is liable for the premium on accident insurance taken out in the name of the construction company by authority of the owner, and the construction company is not an independent contractor.

ACTIONS—MISJOINDER—PARTIES—PRINCIPAL AND AGENT. There is no misjoinder of causes of action in suing the owner and its building agent for the premium on an accident insurance policy issued in the name of the agent by authority of and for the benefit of the owner.

PARTIES—DEFECT OF PARTIES DEFENDANT—PRINCIPAL AND AGENT—ELECTION. There is no defect of parties defendant from the fact that, in an action on a contract of insurance made by a building agent for the owner, an undisclosed principal, the creditor elected to hold the principal only and discharged the agent.

APPEAL—REVIEW—PLEADING—HARMLESS ERROR—DEFECTS CURED BY EVIDENCE. The failure of a complaint to state a cause of action is immaterial where evidence was admitted without objection broadening the issue and establishing a cause of action.

Appeal from a judgment of the superior court for King county, Leroy V. Newcomb, Esq., judge *pro tempore*, en-

[1]Reported in 116 Pac. 284.

tered July 14, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Million & Houser and *Thomas Smith*, for appellant.

R. S. Eskridge (*R. G. Hutchinson*, of counsel), for respondent.

Gose, J.—In June, 1905, the Pacific Construction Company, hereafter called the construction company, entered into a contract with the Washington Portland Cement Company, the appellant, whereby the former agreed to superintend certain construction work for the latter. The contract, after reciting that the appellant was about to commence the construction of a plant for the manufacture of Portland cement, provided that the construction company should furnish "all equipment, tools, and implements commonly used to construct, erect, and complete all work in connection with the clearing, grubbing, grading, and construction of the flumes and trestles, intakes and bulkheads, power house and transmission lines, railroad and tramway included in the plant." It further provided that: "The Pacific Construction Company further agrees to furnish all camp outfit for housing and feeding the men employed on said work, for which they shall be paid at the rate of $5.25 per week, the same to be deducted from the wages of said employees and paid to the Pacific Construction Company." And further provided: "The Pacific Construction Company is to be paid as full compensation for furnishing the above equipment, tools, and outfit and for superintending the construction of the work as aforesaid, ten per cent upon the cost of all material and labor entering into the construction work." It was also agreed that the general manager of the construction company should act in an advisory capacity to the general manager and resident engineer of the appellant in all matters pertaining to the work, when his services were desired, without additional compensation other than his expenses; that the appellant should de-

posit in a designated bank at Seattle, to the credit of the construction company, the sum of $2,000; and that, in addition thereto, it should honor upon presentation all drafts drawn by the construction company "for labor and materials as per invoices and pay rolls, said invoices to be first O. K.'d by the general manager of both companies, and in addition thereto will honor drafts for the ten per cent maturing and becoming due" to the construction company as the work progresses; and that all checks drawn by the construction company against the bank account should be first countersigned by some designated agent of the appellant.

Thereafter and on the 21st day of June, 1905, the respondent, Pennsylvania Casualty Company, entered into a contract of insurance with the construction company, whereby it agreed to indemnify the construction company for the period of one year against loss or liability imposed upon it by law on account of bodily injuries or death suffered by any employee of the assured in the prosecution of the work. The respondent casualty company brought this suit against the construction company and the appellant to recover the balance of an unpaid premium. From a judgment in its favor against the appellant, this appeal is prosecuted.

The appellant contends that there is no liability upon it for the payment of any part of the premium. An analysis of the contract makes it clear, we think, that the construction company was the agent of the appellant in carrying on the work. The construction company agreed to furnish the "equipment, tools, and implements," and to superintend the construction, for a commission of ten per cent of the cost of the labor and material. It further agreed to furnish "all camp outfits for housing and feeding the men employed on said work" for $5.25 per week, "the same to be deducted from the wages of said employees and paid to the Pacific Construction Company." It is apparent from this clause, and indeed from the entire instrument, that appellant was to furnish the labor and material other than the tools and appliances for

carrying on the work, and to bear the expenses incident to the work. The construction company, by the terms of the contract, was obligated to furnish the board and lodging to the men at a fixed price per week, to be paid to it by the appellant. The manager of the construction company testified that he took the indemnity in the name of his company at the solicitation of the appellant's manager; that "I entered into an agreement for this policy the same as I entered into an agreement for a dozen other things. I bought for the Washington Portland Cement Company, iron. I bought powder. I contracted for lumber. I contracted for piles. I entered into contracts for every one of those in the name of the Pacific Construction Company for the Washington Portland Cement Company. They paid the bills, but they were paid through the Pacific Construction Company. The Washington Portland Cement Company furnished the money to pay the bills." It indisputably appears that the manager of the construction company acted as purchasing agent for all the material that went into the work, and that the checks of the construction company issued in payment were paid by the appellant. The construction company was merely the agent of the appellant, its undisclosed principal. It is not necessary to determine what rights the appellant would have had under the policy. If it directed the construction company to procure the insurance in its name it is liable for the premium, the same as it was liable for the material purchased by the construction company as its purchasing agent.

The appellant demurred to the complaint on the grounds, (1) that several causes of action are improperly united; (2) that there is a defect of parties defendant; and (3) that the complaint does not state facts sufficient to constitute a cause of action. It urges here that the demurrer should have been sustained. The first ground is without merit. There is no attempt to state more than a single cause of action. The appellant was not prejudiced by the overruling of its demurrer on the second ground. The judgment was

entered against it, but not against the construction company. *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41. When an agent incurs an obligation for the benefit of an undisclosed principal, the creditor, upon learning the fact, may elect to hold the principal liable. 31 Cyc. 1578, 1579. The election to hold the appellant responsible as an undisclosed principal discharged the liability of the construction company. 31 Cyc. 1578.

The complaint alleges the issuance of the policy, a partial payment of the premium, sets forth the contract between the appellant and the construction company, and, in effect, alleges that each denies its liability and asserts the liability of the other. It is doubtful, therefore, if a cause of action is stated against the appellant. While we have said that the contract shows upon its face that the construction company is merely a superintending agent of the appellant in the prosecution of the work, it is at least questionable whether it would have implied authority to take out accident insurance in its own name at the expense of the appellant. This question we need not decide, inasmuch as practically all the evidence upon both sides was admitted without objection, and as thus broadened, a cause of action is established against the appellant.

It is said that the construction company was an independent contractor, under the rule announced in *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1083. There is no similarity in the facts in the two cases. In that case the railroad company employed the contractors to do the work according to their own methods and with their own tools, material, and men, subject to the one condition that certain defined results should be obtained. The construction company here was in no sense an independent contractor. There is nothing in the contract or the record which remotely suggests such a relation.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9267. Department Two. April 22, 1911.]

N. D. CHETHAM *et al.*, *Respondents*, v. O. E. OLSON, *Appellant*.[1]

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered June 14, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Fred H. Peterson and *Philip D. Macbride*, for appellant.

Bamford A. Robb, for respondents.

PER CURIAM.—The defendant, O. E. Olson, has appealed from a judgment for $1,162.04 damages, entered against him for a breach of his contract to purchase a lot of piles from the plaintiffs, N. D. Chetham and H. Bach, copartners as Chetham & Co. Respondents, as vendors, and appellant, as vendee, entered into the following written contract:

"Seattle, Wash., July 6, 1909.

"O. E. Olson agrees to buy from Chetham & Co., a raft of tight bark fir piles estimated at 50 to 60 M. feet delivered at Seattle on the tide flats as far as tug can reach. Price to be seven cents per ft. cash on delivery or seven and one-fourth (7¼) cents per lin. ft. one-third cash, one-third 30 days and balance 60 days. In latter case Chetham & Co., put bill of sale in bank to be delivered to Olson on completion of contract. Piles to be scaled and agreed upon at mouth of Skagit river where they now are, Olson agreeing to send his representative within four days and agrees to accept his representative's scale as signed for by him to Chetham & Co., (Signed) O. E. Olson."

The trial court found that, on July 9, 1909, the appellant, by his duly authorized agent, one J. E. Johnson, scaled and agreed to accept the piles at the mouth of the Skagit river; that the respondents thereupon delivered them in the harbor at Seattle; that the contract price was $3,975.39; that appellant took possession of the piles and had them towed through the Duwamish drawbridge; that he separated them, causing 9,246 lineal feet to be lost; that he thereafter refused to use, or pay for, any of them; that as soon as possible respondents sold those remaining for $2,813.35, the highest price obtainable; and that they are entitled to recover $1,162.04, their loss in the purchase price.

The appellant contends the piles were not tight barked as required by the contract; that with respondents' knowledge, he purchased them for certain public work in which tight barked piles only could be used; that Johnson was his agent only to scale the piles, not to accept them; that appellant did not accept them; that he was compelled to purchase other piles for use in the public

[1]Reported in 115 Pac. 1134.

work, paying an additional sum therefor to his damage in the sum of $540, for which he demanded judgment.

The controlling issues on this appeal are questions of fact only. We have carefully examined the evidence and conclude that it sustains the findings of the trial judge and the decree entered. We find no prejudicial error in the exclusion of any evidence offered by appellant, nor in the denial of his motion for a new trial. The circumstances of this case all support the contention of respondents that appellant's agent, who was duly authorized in that regard, not only scaled, but that he also inspected, and in writing accepted, the piles before they were shipped from the mouth of the Skagit river by the respondents, and that appellant himself, after having first accepted, later refused to use or pay for them.

The judgment is affirmed.

[No. 9202. Department One. April 24, 1911.]

W. M. EVERETT, *Appellant* v. J. B. SWEATT, *Respondent*.[1]

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 8, 1910. Affirmed.

Monfort & Dodds and *Lawrence Jack*, for appellant.

Peacock & Ludden, for respondent.

PER CURIAM.—This was an action upon a promissory note. The defendant pleaded the statute of limitations. The case was tried to the court sitting without a jury, and resulted in findings and a judgment in favor of the defendant. The case turned on a question of fact: namely, whether the defendant had been a resident of the state of Washington for a period of six years prior to the commencement of the action. To this point all the evidence was directed. While the record is not long, it would serve no useful purpose to review it here. We have carefully read it, and think it preponderates in favor of the finding of the court, rather than against it.

The judgment is affirmed.

[1]Reported in 115 Pac. 1135.

[No. 8920. *En Banc.* May 10, 1911.]

ARTHUR S. BURR, *Appellant*, v. GEORGE DYER *et al.*, *Respondents.*[1]

Appeal from a judgment of the superior court for King county, Main, J., entered January 8, 1910, upon findings in favor of the defendants, quieting their title, in an action brought for partition. Affirmed.

T. Howard Shelley (*J. W. Russell*, of counsel), for appellant.

Guie & Guie, for respondents.

ON REHEARING.[2]

PER CURIAM.—A rehearing was granted in this case. Upon reargument of the case to all the members of the court, a majority are satisfied with the result reached. The judgment is therefore affirmed.

[No. 9324. *En Banc.* May 12, 1911.]

WASHINGTON DREDGING & IMPROVEMENT COMPANY, *Appellant*, v. THE STATE OF WASHINGTON *et al.*, *Respondents.*[3]

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 28, 1910. Affirmed.

Thos. M. Vance and *W. F. Hays*, for appellant.

Chas. A. Kinnear, *Geo. B. Cole*, *John E. Humphries*, *A. A. Booth*, *George E. de Steiguer* and *Geo. T. Reid* (*Alfred Battle*, of counsel), for respondents Kinnear *et al.*

W. P. Bell, *Attorney General*, and *W. V. Tanner*, *Assistant*, for respondent State of Washington.

PER CURIAM.—This is an appeal from an order and judgment sustaining the defendants' demurrers to the plaintiff's amended complaint, denying leave to file its proposed second amended complaint, cancelling the notice of the pendency of the action of record in the office of auditor of King county, and dismissing the action. The only question involved is the sufficiency of the facts alleged in the amended complaint and proposed second amended complaint to entitle appellant to the relief prayed for. A careful reading of the

[1]Reported in 115 Pac. 512.

[2]NOTE: For former opinion, see 60 Wash. 603, 111 Pac. 866.—REP.

[3]Reported in 115 Pac. 1135.

appellant's allegations convinces us that the facts relied upon for relief are not materially different from those before the court and upon which we decided the case of *Washington Dredging & Improvement Co. v. State*, 53 Wash. 346, 101 Pac. 884. Indeed, this is, in substance, an attempt to again litigate questions finally determined by that decision.

The judgment is affirmed.

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reviewable on appeal from the judgment, and hence cannot be raised on appeal from an order refusing to vacate the judgment. *State v. Tenney* 486

23. APPEAL AND ERROR—REVIEW—ESTOPPEL TO ALLEGE ERROR. Defendant owners, in an action to foreclose a mechanics' lien, cannot allege error in failure to sustain a demurrer to the cross-complaint of the defendant contractor as premature, where the defect was not disclosed on the face of the cross-complaint, the contractor was properly made a party and compelled to answer, and the plaintiffs joined issue thereon seeking affirmative relief against the contractor, and went to trial on the merits. *Seattle Turning and Scroll Works v. Eckloff* 82

24. APPEAL — REVIEW — MOTION FOR NONSUIT — WAIVER. Defendants may urge their motion for nonsuit in the appellate court, although they proceeded with the trial, where it was erroneously overruled and the defect was not cured by the proofs subsequently submitted. *Linck v. Matheson* 593

25. APPEAL—REVIEW—PLEADINGS—AMENDMENT TO CONFORM TO PROOF. A somewhat indefinite complaint for damages to property, by reason of the negligent construction of a fill in a street, will be deemed amended on appeal to conform to proof, admitted without objection, that the injury resulted from defective plans of the city, rather than defective workmanship. *Potter v. Spokane* 267

26. APPEAL—REVIEW—NEW TRIAL—DISCRETION. Where the evidence is conflicting, the supreme court will not review an order granting a new trial because of insufficiency of the evidence, where there was no clear abuse of discretion. *Sylvester v. Olson* 285

27. APPEAL AND ERROR—REVIEW—FINDINGS—CONCLUSIVENESS. Error cannot be urged in failing to allow defendant's entire cross-claim for damages for delay, where the same was put in issue, the evidence was not all brought up on appeal, the statement of facts recites that evidence was introduced tending to support the findings of fact made by the court, and the court found that the cross-claim for damages was not proven except as to the items allowed. *Seattle Turning and Scroll Works v. Eckloff* 82

28. APPEAL—REVIEW—FINDINGS—FACT OF MARRIAGE. Upon an issue as to whether a marriage ceremony was performed between an Indian woman and a white man, findings will not be disturbed on appeal where the evidence was so contradictory that it is difficult to reach a conclusion without a personal view and hearing of the witnesses. *Weatherall v. Weatherall* 526

29. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal unless manifestly unjust. *Sloan v. West.* 623

APPEAL AND ERROR—CONTINUED.

30. APPEAL AND ERROR—REVIEW—RECEPTION OF EVIDENCE—MISCONDUCT OF JUDGE—PREJUDICE. The erroneous admission of an unidentified photograph of the scene of the accident is so prejudicial as to require a reversal, where undue prominence was given to it by statements of the trial judge declaring it to be identical with an exhibit used on a former trial, when it was not, and manifesting uncalled for feeling and accusing appellant's counsel with bad faith. *Pantages v. Seattle Electric Co.* 159

31. APPEAL—REVIEW—EXCLUSION OF EVIDENCE—HARMLESS ERROR. Error in the exclusion of evidence is not prejudicial where the fact was clearly proven by other evidence. *Warren v. Kearney* 369

32. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for slander in charging incest, in which the defendant pleaded in justification that the charges were true, and that was the principal issue and the fact of publication was not seriously denied, it is not prejudicial error that the court instructed the jury that they must find for the defendant if the charges were true, "otherwise for the plaintiffs," where, by other instructions, the burden of proving the complaint was placed upon the plaintiff. *Warren v. Kearney* ... 369

33. SAME. Where the jury is not misled, it is not prejudicial error that the instructions were not given in the usual order and that those consistent with the plaintiff's theory were given last. *Warren v. Kearney* 369

34. APPEAL — REVIEW — HARMLESS ERROR — PRESUMPTIONS. The presumption of prejudice from error in instructions on the issues presented by the pleadings is overcome by the presumption in favor of the judgment, where the evidence on which the verdict was based is not brought up on appeal. *Morgan v. Bankers Trust Co.* 476

35. APPEAL—REVIEW — HARMLESS ERROR — JURY TRIAL — QUESTION OF LAW. The trial of an action to try title as an equitable case, and refusing to submit all the issues to a jury, is harmless where the evidence was insufficient to overcome the legal presumptions flowing from deeds. *Sloan v. West* 623

36. APPEAL—REVIEW—HARMLESS ERROR. In an action by bailors for the value of goods lost, it is harmless error that judgment was rendered in favor of both plaintiffs when the evidence showed that only one of them was interested in the goods. *Nowell v. Seattle Transfer Co.* 685

37. APPEAL—REVIEW—PLEADING—HARMLESS ERROR—DEFECTS CURED BY EVIDENCE. The failure of a complaint to state a cause of action is immaterial where evidence was admitted without objection broadening the issue and establishing a cause of action. *Pennsylvania Casualty Co. v. Washington Portland Cement Co.* 689

APPEAL AND ERROR—CONTINUED.

38. APPEAL—DECISION—FORMER DECISION AS LAW OF CASE. Where the supreme court has held, on a former appeal of a case, that the failure of a city to plead a prior judgment precluded any recovery against the defendant, the decision will be followed as the law of the case on a second appeal. *Seattle v. Northern Pac. R. Co....* 129

39. APPEAL—REVIEW—DECISION—SUBSEQUENT APPEAL—LAW OF CASE. Where, upon a former appeal, the supreme court held that the title to property was separate and subject only to defeasance by matters not in the record, and on a retrial, there was presented only a question of law as to the effect of deeds, the former decision is conclusive. *Sloan v. West*..... 623

APPEARANCE:

1. APPEARANCE—PROCESS—DEFECTS—WAIVER — UNLAWFUL DETAINER. A defect in a summons in unlawful detainer, in not requiring the defendant to appear within fifteen days, as required by statute, is waived by a general appearance. *Olson Land Co. v. Alki Park Co.* 521

APPLIANCES:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 2, 3, 11, 15, 18.

APPLICATION:

For new trial, see CRIMINAL LAW, 10.

APPOINTMENT:

Of assessment commissioners for construction of ship canal, see COUNTIES.

APPORTIONMENT:

Liability of prior grantee for deficiency in subsequent grant, see BOUNDARIES.

APPROPRIATION:

Of state funds in aid of Federal enterprise, see STATES.

ARBITRATION:

Value of rental in condemnation of leasehold, see EMINENT DOMAIN, 5.

ASSAULT:

By servant on third person, see MASTER AND SERVANT, 21.

ASSESSMENT:

By county upon lands benefited by ship canal as grant of special privilege or immunity, see CONSTITUTIONAL LAW, 3, 4.

Commissioners to equalize assessment for construction of ship canal, see COUNTIES.

ASSESSMENT—CONTINUED.

Compensation for property taken or injured for public use, see EMINENT DOMAIN, 4.

Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 4-8.

Power of officers to agree to pay cost of street improvement, see SCHOOLS AND SCHOOL DISTRICTS.

Of tax, see TAXATION.

ASSIGNMENT:

Rights of assignee to change trade-name, see TRADE-MARKS AND TRADE-NAMES.

ASSIGNMENT FOR CREDITORS:

1. ASSIGNMENT FOR CREDITORS—DISCHARGE—PARTNER OF DEBTOR—LIABILITY FOR DEFICIENCY. Where creditors agree to accept an assignment in full payment of their claims, they cannot subsequently recover the deficiency from an associate of their debtor on the claim that there was a silent partnership between them; since the discharge of one partner discharges all. *Blodgett v. Inglis*..... 513

2. SAME—REPRESENTATIONS—EFFECT. An agreement by creditors to discharge their debtor in consideration of an assignment for creditors operates to discharge the debtor's partner, notwithstanding representations made to the creditors that it would not have that effect, where the partner was not responsible for the representations. *Blodgett v. Inglis*..... 513

ASSISTANCE, WRIT OF:

Right of receiver in bankruptcy to appeal from order granting writ, see APPEAL AND ERROR, 1.

Prohibiting issuance of writ, see PROHIBITION.

1. ASSISTANCE, WRIT OF—MORTGAGES—FORECLOSURE—PARTIES BOUND—PRIVIES. Upon the issuance of a certificate of sale on foreclosure, a writ of assistance may issue against one in possession as receiver in bankruptcy of the estate of the defendant, appointed pending the suit, although he was not made a party to the action, on the theory that the proceeding is *in rem* and he is bound as in privity with the mortgagor. *State ex rel. Biddle v. Superior Court*.... 312

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 11, 12.

ATTACHMENT:

1. ATTACHMENT—PROCESS—NOTICE BY PUBLICATION — PARTNERSHIP — ACTIONS AGAINST—JURISDICTION. In an action of attachment brought against a foreign corporation, constructive service by publication and mailing of the summons to the corporation, is not sufficient to confer any jurisdiction over the attached property belonging to a

ATTACHMENT—CONTINUED.

foreign copartnership of the same name and place, there being nothing in the record to show the names of any of the copartners; in view of Rem. & Bal. Code, §§8366, 8369, contemplating that actions against partnerships shall be prosecuted by and against the general partners only, and § 228, requiring that service by mailing be "directed to the defendant," which must be strictly followed. *Yarbrough v. Pugh*..... 140

ATTORNEY AND CLIENT:

Right to fees under agreement to pay expenses of defense of suit, see CONTRACTS.

Jurisdiction of court to allow fees upon consent of parties and stipulation to dismiss, see COURTS, 3.

Conduct at trial of criminal prosecution, see CRIMINAL LAW, 4, 13.

Stipulation for payment of fees, see STIPULATIONS.

1. ATTORNEY AND CLIENT—DEALINGS BETWEEN — FRAUD—EVIDENCE—SUFFICIENCY. The evidence sustains findings that attorneys did not overreach a client in entering into a contract whereby half of his stock in a mining corporation was turned over to the attorneys in consideration of their raising the funds to pay off the indebtedness and finance the concern, the other half of his stock to be held under a pooling agreement, where the client owned the majority of the stock, the concern was in the hands of a receiver, there was no market for the stock and no other way to pay off the indebtedness, and the client made the proposition with full knowledge of the facts and was fully competent to attend to business. *Winsor v. Commonwealth Coal Co*..... 62

AUTHORITY:

Of county to make local improvement, see COUNTIES.

Of wife to fix domicile, see DOMICILE.

Want of to perform marriage ceremony as evidence of exercise of authority, see MARRIAGE, 3.

Of agent of railroad company, see RAILROADS, 1.

Of school district officers, see SCHOOLS AND SCHOOL DISTRICTS.

Of state to aid in Federal enterprise, see STATES.

Of railway and tax commission in fixing valuation of railroad property, see TAXATION, 1, 3-6.

AUTOMOBILES:

Injury to persons in city street, see MUNICIPAL CORPORATIONS, 11-13.

AWARD:

Acceptance of award of damages as estoppel to attack assessment, see MUNICIPAL CORPORATIONS, 6.

BAILMENT:

See WAREHOUSEMEN.

1. BAILMENT—PLEADINGS—AMENDMENTS. In an action by bailors to recover the value of goods lost by a bailee, it is not error to allow the complaint to be amended to allege that the plaintiffs were the owners of the goods. *Nowell v. Seattle Transfer Co*..... 685

BANKRUPTCY:

Appeal by receiver, see APPEAL AND ERROR, 1.

Issuance of writ of assistance in foreclosure proceedings against receiver in bankruptcy, see ASSISTANCE, WRIT OF.

BANKS AND BANKING:

1. BANKS AND BANKING—CHECKS—DEPOSIT FOR COLLECTION—TITLE. A customer's indorsement of a check without restriction, and its deposit with credit subject to check, does not pass the title to the bank, where there was an understanding and custom that the bank was to receive it for collection and charge it back to the customer if dishonored. *Morris-Miller Co. v. Von Pressentin*..... 74

2. BANKS AND BANKING—DEPOSITS—PAROL EVIDENCE OF CONDITIONS—COMPETENCY. Evidence is competent to show that the delivery and indorsement of a check to a bank by a depositor, without restriction, is in fact conditional, and for the purpose of collection without passing title, under Rem. & Bal. Code, § 3407, so providing as to the delivery of an indorsed instrument which has not come into the hands of a holder in due course. *Morris-Miller Co. v. Von Pressentin* 74

3. BANKS AND BANKING—CHECKS—FAILURE TO COLLECT—NEGLIGENCE—NOTICE TO DRAWER. Where a depositor was put upon notice of the failing condition of his bank, was reducing his deposits, and knew that it could not obtain funds to meet its obligations, he is not injured by, and cannot complain of, negligence in the failure to notify him of nonpayment of a check which he had drawn and sent to another city, whereby several days would elapse before any steps could be taken to collect the check, during which time he learned of the dishonor at a time when the bank had sufficient cash to pay it, but made no attempt to protect himself either by insisting upon payment of the check or withdrawing the deposit, and the bank was insolvent. *Morris-Miller Co. v. Von Pressentin*..... 74

4. SAME—EVIDENCE OF NEGLIGENCE—BURDEN OF PROOF. In an action by the drawer of a check to charge the payee with negligence in failing to collect it, the burden is upon the plaintiff to prove that the drawee was solvent and the claim good and collectible. *Morris-Miller Co. v. Von Pressentin*..... 74

BANKS AND BANKING—CONTINUED.

5. BANKS AND BANKING—CHECKS — PAYMENT — MISTAKE. Where a bank paid a check drawn upon it under the mistaken belief that the drawer had funds there subject to check, it cannot recover the payment from the payee, since that would destroy the certainty pertaining to such transactions; and it is immaterial that the mistake was due to the confusion incident to paying the check after banking hours, as an accommodation, when the drawer's deposits had been withdrawn the same day. *Spokane & Eastern Trust Co. v. Huff*. 225

BAR:

Of action by former adjudication, see INDEMNITY; JUDGMENT, 4, 5.
Of action by limitation, see LIMITATION OF ACTIONS.
Laches as bar to action for accounting, see PARTNERSHIP, 4.

BENEFICIARIES:

Of charitable trust, see CHARITIES.

BENEFITS:

Assessment for benefits from local improvement, see EMINENT DOMAIN, 4; MUNICIPAL CORPORATIONS, 4-8.

BEQUESTS:

See WILLS.

BETTERMENTS:

Recovery of, see IMPROVEMENTS.

BILLS AND NOTES:

Agreement to employ maker of notes executed in consideration of release of corporation as affecting liability of new debtor, see NOVATION.
Pledge by corporation of notes for stock subscription, see PLEDGES.

1. BILLS AND NOTES—BONA FIDE PURCHASER—HOLDER IN DUE COURSE—GOOD FAITH—BURDEN OF PROOF—STATUTES—CONSTRUCTION. The negotiable instruments act, Rem. & Bal. Code, § 3443, providing that a holder in due course is one who takes in good faith for value, and § 3450, providing that, if the title of one who negotiates a note is defective, the burden is upon the holder to prove that he is a holder in due course, must be construed in connection with § 3447, which provides that to constitute notice of an infirmity or defect in title, there must be actual knowledge thereof or of such facts that the taking of the note amounts to bad faith; hence, where the holder has established by undisputed evidence that it is a holder in due course without actual notice, the burden then devolves upon the maker to

BILLS AND NOTES—CONTINUED.

show that the holder was guilty of some act, neglect or inexcusable omission amounting to *mala fides* on its part sufficient to show dishonest dealing preventing it from being a holder in due course; negligence or the omission of precautions or the mere suspicion of an infirmity not being sufficient to constitute bad faith or to put upon inquiry. *Scandinavian American Bank v. Johnston*..... 187

2. SAME—EVIDENCE—SUFFICIENCY. Where the title to a note was defective by reason of fraud not discovered until after it was negotiated to a bank, and the bank established, by the undisputed evidence of disinterested witnesses, that it took the same before maturity for full value in good faith, it is entitled to a directed verdict as a holder in due course; and it is not evidence of bad faith or sufficient to put the bank on inquiry, and prevent a directed verdict, that the maker had previously negotiated to the same bank the notes of another person the title to which was claimed to be defective, where the prior transaction was closed and settled three months before the other note was in existence, and bore no relation to it, there was no occasion to prosecute any inquiry on the prior occasion, and inquiry would have disclosed nothing as to the note and transaction in question. *Scandinavian American Bank v. Johnston*..... 187

3. BILLS AND NOTES—BONA FIDE PURCHASER—HOLDER IN DUE COURSE—EVIDENCE—SUFFICIENCY. Where the title to a note was defective by reason of fraud not discovered until after it was negotiated to a bank, and the bank established, by the undisputed evidence of disinterested witnesses, that it took the same before maturity for full value in good faith, it is entitled to a directed verdict as a holder in due course; and it is not evidence of bad faith, or sufficient to put the bank on inquiry, and prevent a directed verdict, that the maker had previously negotiated to the same bank the notes of another person the title to which was claimed to be defective, where the prior transaction was closed and settled three months before the note in question was negotiated to the bank, and bore no relation to it, and there was no occasion to prosecute any inquiry on the prior transaction. *Scandinavian American Bank v. Appleton* 203

BOARDS:

Review of decisions of, see CERTIORARI.

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see BILLS AND NOTES.

BONDS:

On appeal, see APPEAL AND ERROR, 5.

BOUNDARIES:

Mistake as to boundary line, see ADVERSE POSSESSION.
Of streets, see DEDICATION.

1. BOUNDARIES — PRACTICAL LOCATION — EVIDENCE — SUFFICIENCY. A practical location of a boundary line is not shown by mere notice that an adjoining owner made a private survey to establish the correct boundary, without proof that it was accepted or agreed to or that improvements were made with reference thereto. *Hruby v. Lonseth* 589

2. BOUNDARIES—DEFICIENCY — APPORTIONMENT. The grantee, first in time, of a portion of a tract set off by metes and bounds, without references to other conveyances, is not required to yield any portion of his land to satisfy a deficiency in a subsequent overlapping grant from the common grantor; the rule of apportioning excess or deficiency having no application. *Hruby v. Lonseth*..... 589

BREACH:

Liability of owner for commissions on breach of contract with purchasers of land, see BROKERS.
Of contract of employment by corporation, see CORPORATIONS, 8.
Damages for breach of contract, see DAMAGES, 3.
Of stipulation in deed to maintain crossing, see RAILROADS, 2-4.
Of warranty, see SALES, 2-9, 11.
Of contract for sale of land, see VENDOR AND PURCHASER.

BRIEFS:

On appeal, see APPEAL AND ERROR, 19.

BROKERS:

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

1. BROKERS—RIGHT TO COMMISSIONS — PAYMENT — PERFORMANCE BY OWNER. Although a broker's contract provided that it should receive its commissions out of payments made by purchasers on contracts for land and water rights, the owner is liable for the whole commissions where the owner breached its contract to furnish water and the payments were not made because of the owner's failure to perform. *Pederson v. North Yakima & East Selah Irrigation Co.* 636

BUILDINGS:

Applying doctrine of safe place to incompleted structures, see MASTER AND SERVANT, 5.

BURDEN OF PROOF:

In action against bank for negligence in failing to collect check, see BANKS AND BANKING, 4.
To show *mala fides* preventing bank from being holder of note in due course, see BILLS AND NOTES, 1.
To show community nature of property, see HUSBAND AND WIFE, 13.
To show time of termination of lease, see LANDLORD AND TENANT, 3.

CANALS:

Validity of act authorizing levy of assessment on lands benefited by ship canal, see CONSTITUTIONAL LAW, 3, 4.

Grants by state in aid of Federal ship canal, see NAVIGABLE WATERS.

1. CANALS—CONSTRUCTION—STATES—AUTHORITY—STATUTES. The act of 1909, creating a special fund and appropriating moneys therefrom to be expended in the construction of the Lake Washington canal, theretofore authorized by other legislation, cannot be invoked by taxpayers as in any manner affecting the authority for the construction of the canal. *Bilger v. State*..... 457

2. CANALS—CONSTRUCTION BY FEDERAL GOVERNMENT—STATUTES. The intention of the Federal government to undertake the work of constructing a ship canal within the requirements of a state act providing therefor, is sufficiently shown by Federal appropriations amounting to over two and a quarter millions of dollars for the purpose. *Bilger v. State*..... 457

CANCELLATION:

Of assessment for benefits to lots damaged by improvement, see MUNICIPAL CORPORATIONS, 5.

CANCELLATION OF INSTRUMENTS:

Deed from stockholder to corporation, see CORPORATIONS, 4.

Vacation of deed on ground of mental incapacity of grantor, see DEEDS, 2.

Rescission of lease, see LANDLORD AND TENANT, 3.

Vacation of mortgage foreclosure sale, see MORTGAGES, 4.

Rescission of contract, see SALES, 2, 9; VENDOR AND PURCHASER, 2-5.

CAPACITY:

Of testator to make will, see WILLS, 2, 3.

CARRIERS:

1. CARRIERS — STREET RAILWAYS — SETTING DOWN PASSENGERS — INSTRUCTIONS. An instruction relating to the negligence of a street car conductor in starting a car, from which plaintiff had alighted, while her dress was caught on the car is within the pleadings and proof that the car was started while she was attempting to leave it after it had come to a stop. *Morrison v. Seattle Electric Co.*. 531

2. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries sustained by a passenger on a street car, instructions to find for the plaintiff if the allegations of the complaint are proved, unless her own negligence caused the injury, are not erroneous as ignoring the defense of contributory negligence, where other instructions properly submitted that issue. *Morrison v. Seattle Electric Co.* 531

CAVEAT EMPTOR:

See SALES, 9; VENDOR AND PURCHASER, 1.

CERTAINTY:

Of beneficiaries of charitable trust, see CHARITIES.

CERTIFICATE:

To statement of facts or bill of exceptions, see APPEAL AND ERROR, 17, 18.

CERTIORARI:

1. CERTIORARI—REVIEW OF BOARDS—DISMISSAL OF POLICE OFFICER. A writ of certiorari to review the dismissal of a police officer by the civil service commission is properly quashed where the cause assigned for dismissal was sufficient. *King v. Listman*..... 271

CESSATION OF USE:

Property conveyed in trust for charitable purposes, see CHARITIES, 3.

CHAMPERTY AND MAINTENANCE:

1. CHAMPERTY AND MAINTENANCE—CONTRACTS. An agreement by the president of a society to pay all the costs and expenses of the defense of a suit to reinstate a member is not champertous, or void as against public policy, where the president was a party defendant to the suit, and as executive head of the society had a personal interest in the litigation. *Mazzini Society v. Corgiat*..... 273

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 8, 9, 14.
To jury in civil actions, see TRIAL, 4, 5.

CHARITIES:

1. CHARITIES—CREATION—PURPOSE OF TRUST — EDUCATION. A charitable trust for educational purposes is created by conveyances in trust for the benefit of the membership of a brotherhood for the purpose of a communal industrial institution and the education of the people in the principles of socialism. *Peth v. Spear*..... 291

2. CHARITIES—BENEFICIARIES—CERTAINTY. A conveyance for charitable purposes, in trust for the membership, now existing or hereafter to exist, of an unincorporated brotherhood, is not invalid because the beneficiaries are an unascertained or uncertain body or class, that being characteristic of charitable trusts. *Peth v. Spear* 291

3. CHARITIES—CESSATION OF USE—QUIETING TITLE—ANSWER. In an action to quiet title, an answer alleging that a charitable trust had failed by reason of the fact that the beneficiaries had procured a dissolution of the society through the courts, and a judicial sale of the land, which was void, does not show that the title reverted to the donors of the trust, but only shows a cessation of the uses for which the property was devoted, and is insufficient on demurrer, to show title in the successors of the donors. *Peth v. Spear*..... 291

CHECKS:

See BANKS AND BANKING.

CHILD:

See PARENT AND CHILD.
Employment of child under age limit, see MASTER AND SERVANT, 1.

CITATION:

See PROCESS.
On appeal, see APPEAL AND ERROR, 6-9.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Privileges and immunities, see CONSTITUTIONAL LAW, 3.

CIVIL RIGHTS:

Regulation of practice of medicine as invasion of civil rights, see CONSTITUTIONAL LAW, 1.

CLAIMS:

Adverse claim to land, see ADVERSE POSSESSION, 4.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6.
Mining claim as separate property, see HUSBAND AND WIFE, 9, 10.
Of lien for labor or materials furnished, see MECHANICS' LIENS, 3.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 3.

COLLATERAL SECURITY:

Foreclosure by pledgee, see PLEDGES.

COLLECTION:

Deposits for collection, see BANKS AND BANKING, 1-4.

COLLISION:

In city street between vehicles or pedestrian and vehicle, see MUNICIPAL CORPORATIONS, 9-14.
Between automobile and street car, see STREET RAILROADS.
Findings of court as to damages from as within issues and proof, see TRIAL, 9.

COMMISSIONERS:

Review of action of civil service commission in dismissing police officer, see CERTIORARI.

To equalize county assessment for construction of ship canal, see COUNTIES.

Mandamus to compel insurance commissioner to designate newspaper for publication of insurance reports, see MANDAMUS.

Discretion of insurance commissioner to designate newspaper for publication of insurance reports, see NEWSPAPERS.

Valuation of railroad property by railway or tax commission, see TAXATION, 1, 3-6.

COMMISSIONS:

Contract by broker for sale of real estate for, see FRAUDS, STATUTE OF, 2.

Of broker, see BROKERS.

COMMON CARRIERS:

See CARRIERS.

COMMON PROPERTY:

Of husband and wife, see HUSBAND AND WIFE, 1-3.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 4-13.

COMPENSATION:

Of broker, see BROKERS.

Of attorney, see CONTRACTS.

Jurisdiction of court to allow administrator's and guardian's fees on trial of equitable issue, see COURTS, 2.

For property taken or damaged for public use, see EMINENT DOMAIN. 4-9.

Requirements of statute of frauds as to broker's agreement for commissions, see FRAUDS, STATUTE OF, 2.

For improvements, see IMPROVEMENTS.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 3, 4.

COMPLAINT:

In criminal prosecutions, see CRIMINAL LAW, 3.

In civil actions, see PLEADING.

COMPROMISE AND SETTLEMENT:

See ACCORD AND SATISFACTION.

CONCLUSION:

Of witnesses, see EVIDENCE, 3, 4.
In pleading, see PLEADING, 4.

CONCLUSIVENESS:

Decision as law of case on second appeal, see APPEAL AND ERROR, 38, 39.
Decision of court as to jurisdiction, see COURTS, 4.
Of former judgment exonerating railway company from liability for negligence, see INDEMNITY.
Of judgment, see JUDGMENT, 4, 5.
Decision of disputes as to earning newspaper advertising reward, see REWARDS.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

Partnership property, see PARTNERSHIP, 3.

CONDITIONS:

Parol evidence of conditions on delivery of indorsed check to bank, see BANKS AND BANKING, 2.
Precedent to commencing action by corporation, see CORPORATIONS, 10.

CONFIRMATION:

Of foreclosure sale, see MORTGAGES, 3.

CONSIDERATION:

For release or discharge of claim, see ACCORD AND SATISFACTION, 2.
Cancellation of deed from member to corporation for failure of consideration, see CORPORATIONS, 4.
Release of lien by claimant without consideration, see MECHANICS' LIENS, 1, 2.

CONSTITUTIONAL LAW:

Summary punishment of contempt as denial of due process of law, see CONTEMPT.
Statutes providing for condemnation of state school lands, see EMINENT DOMAIN, 1.
Subjects and titles of statutes, see STATUTES, 1.
Uniformity, see TAXATION, 1.

1. CONSTITUTIONAL LAW—CIVIL RIGHTS—PRACTICE OF MEDICINE—REGULATION. An act prohibiting the practice of medicine without first obtaining a license is within the acknowledged powers of the state. *State v. Greiner*..... 46

CONSTITUTIONAL LAW—CONTINUED.

2. CONSTITUTIONAL LAW — IMPAIRING OBLIGATIONS OF CONTRACTS — MORTGAGES—FORECLOSURE—POSSESSION — REMEDIES. A statute relative to mortgage foreclosure sales is unconstitutional as to existing mortgages as impairing the obligation of the contract, in so far as it requires the sheriff to postpone the sale for one year and gives the mortgagor possession of the premises during that time, when the former law gave the mortgagee the right to an immediate sale with the right of possession during the period of redemption; but the law is valid in changing the requirements as to the notices of sale; since that merely affects the remedy and not the obligation of the contract. *Strand v. Griffith*..... 334

3. CONSTITUTIONAL LAW—CLASS LEGISLATION. An act authorizing a county to levy assessments upon lands benefited by a ship canal does not violate Const., art. 1, § 12, prohibiting the granting of special privileges and immunities to any citizens or class of citizens or corporations other than municipal, since a county is a municipal corporation. *Bilger v. State*..... 457

4. CONSTITUTIONAL LAW—DUE PROCESS—ASSESSMENTS FOR IMPROVEMENTS. Property is not taken without due process of law by the act of 1907, p. 582, which provides for the construction of the Lake Washington canal at the expense of property benefited, after an assessment with a hearing before a board empowered to equalize the assessment and right of appeal to the courts. *Bilger v. State*... 457

CONSTRUCTION:

Of statutes relating to *bona fide* purchaser or holder of notes, see BILLS AND NOTES, 1.
Of ship canal by state and government authority, see CANALS.
Of contract, see CONTRACTS.
Of contract for stipulated damages, see DAMAGES, 1.
Of agreement to pay support of children pending appeal, see DIVORCE, 3.
Of lease, see LANDLORD AND TENANT, 1, 8.
Provisions of right of way deed, see RAILROADS, 2.
Of statutes, see STATUTES, 2.
Of stipulation, see STIPULATIONS.
Of statutes providing for valuation and assessment of railway property, see TAXATION, 4, 5.
Of water contract, see WATERS AND WATER COURSES, 6.

CONSTRUCTIVE TRUSTS:

See TRUSTS.

CONTEMPT:

For failure to pay alimony, see DIVORCE, 4, 5.

1. CONTEMPT — IN VIEW OF COURT — STATUTES. Rem. & Bal. Code, § 2372, defining contempt of court as disorderly or insolent behavior committed during the sitting of the court, "in its immediate view and presence," is declaratory of the common law and equivalent to contempt "in the face of the court." *State v. Buddress*..... 26

2. CONTEMPT—JUDGMENT—IN VIEW OF COURT—RECITATION OF FACTS—SUFFICIENCY. A judgment of summary punishment for contempt of court sufficiently states that the acts were committed in the "immediate view and presence of the court," where it recites the pendency of the action, and that the accused was applying to have a judgment "signed by the court," and that in the presence of the judge at chambers in the court house, he used boisterous and angry language and gestures, and in the clerk's office and in the immediate presence of the court engaged in a fight; the only reasonable construction being that it was in "view" of the court although that word was not used. *State v. Buddress*..... 26

3. SAME. Such judgment shows a contempt within Rem. & Bal. Code, § 2372, by a breach of the peace or other disturbance directly tending to interrupt the proceedings of the court. *State v. Buddress* 26

4. CONTEMPT—IN VIEW OF COURT—RECESS—JUDGMENT—RECITATION OF FACTS—SUFFICIENCY. A summary judgment of contempt of court is not open to the objection that it fails to show that the court was in session, where it appears that the accused was guilty of a breach of the peace directly tending to interrupt the proceedings of a court and that the court was transacting business when the interchange of words took place; and it is immaterial that the court suspended business during a fight that followed, or was in recess. *State v. Buddress* 26

5. CONTEMPT—PROCEEDINGS—CONSTITUTIONAL LAW—DUE PROCESS OF LAW. A summary punishment of contempt committed in the presence of the court is not a denial of due process of law merely because there was a delay in entering the order, due process meaning according to the established forms of law; especially where defendant's appeal recited that the notice of appeal was taken in open court on the same day that the act was committed. *State v. Buddress*..... 26

6. CONTEMPT—PROCEEDINGS—APPEAL—FACTS RECITED IN JUDGMENT—REVIEW. Upon appeal from a summary conviction of contempt committed in the presence of the court, the facts recited in the order are taken as true; and where they show jurisdiction and are sufficient to constitute contempt, there can be no further inquiry on appeal. *State v. Buddress*..... 26

CONTRACTS:

See ACCORD AND SATISFACTION; BAILMENT; BILLS AND NOTES; CORPORATIONS, 5-8; DEEDS; HUSBAND AND WIFE, 8; INDEMNITY; INTEREST; SALES; WAREHOUSEMEN.
Between attorney and client, see ATTORNEY AND CLIENT.
Liability of owner for commissions on breach of contract with purchasers of land, see BROKERS.
Operation and effect of champerty, see CHAMPERTY AND MAINTENANCE.
Impairing obligation, see CONSTITUTIONAL LAW, 2.
Stipulated damages or penalties, see DAMAGES, 1, 2.
Measure of damages on breach, see DAMAGES, 3.
Effect of paying support of children pending appeal under agreement not to issue execution on judgment, see DIVORCE, 3.
For electric current, action for price, see ELECTRICITY, 1-3.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Leases, see LANDLORD AND TENANT.
Novation, see NOVATION.
Pleading in action on, see PLEADING, 2, 4.
Of railroad company, see RAILROADS, 2-4.
Reformation, see REFORMATION OF INSTRUMENTS.
Agreement to pay cost of improving street, see SCHOOLS AND SCHOOL DISTRICTS.
Stipulation in actions, see STIPULATIONS.
Sales of realty, see VENDOR AND PURCHASER.
To irrigate lands, see WATERS AND WATER COURSES, 2-6.

1. CONTRACTS—CONSTRUCTION—SUBJECT-MATTER INCLUDED. An agreement to pay all the costs and expenses of the defense of a suit includes the fees of attorneys for services therein, but not the costs and expenses of defending a suit brought by the attorneys to recover their bill. *Mazzini Society v. Corgiat*..... 273

CONTRIBUTORY NEGLIGENCE:

Of passenger, see CARRIERS, 2.
Of servant, see MASTER AND SERVANT, 15-18.
Of person injured on street, see MUNICIPAL CORPORATIONS, 13, 14.
Of person falling down stairway in store, see NEGLIGENCE, 2.
Of person injured on or near railroad tracks, see RAILROADS, 6.

CONVEYANCES:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; DEEDS; HUSBAND AND WIFE, 8; MORTGAGES.
Creation of charitable trust, see CHARITIES.
Between stockholder and corporation, see CORPORATIONS, 4.
In trust, see TRUSTS.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.

Acquisition of property by condemnation, see EMINENT DOMAIN, 5-9.

Release of corporation and substitution of new debtor, see NOVATION.

Pledge of stockholder's notes for stock subscription as collateral security for own note, see PLEDGES.

Taxation of corporations and corporate property, see TAXATION, 1, 3-6.

Transfer of stock to person advancing loan as usurious transaction, see USURY.

Water companies, reasonable regulations, see WATERS AND WATER COURSES, 2-6.

1. CORPORATIONS — SALE OF STOCK — FRAUD—EVIDENCE—SUFFICIENCY. Where plaintiff was induced to sell the controlling interest in a corporation, and in an action for damages, claimed that defendant was guilty of fraud, and wrongfully discharged the plaintiff as an officer, and so mismanaged the corporation that its assets were sold in bankruptcy proceedings, to plaintiff's damage in a sum equal to the value of his stock in the company, the evidence is insufficient to establish defendant's fraud in the purchase of the stock, where it appears that plaintiff was solicitous to sell after several months negotiations, that the price was fair and the sale without fraudulent inducement and there was no fraud in the sale in bankruptcy, that the plaintiff was discharged from his position for good cause, and that the bankruptcy proceeding resulted from plaintiff's refusal to advance an inconsiderable sum as his *pro rata* share for the renewal of a mortgage due to a bank. *Badere v. Goodrich*..... 650

2. CORPORATIONS — ACTIONS BETWEEN STOCKHOLDERS—ACCOUNTING — RECEIVER—INJUNCTION. Where there was a deadlock between two equal stockholders of a corporation, an action to settle their rights, appoint a receiver, and wind up the corporation should be allowed to go to final adjudication before requiring a sale of the assets, unless necessity therefor exists; and it is error, upon appointing a receiver, to direct a sale and enjoin the parties from taking any steps in the proceedings to secure an accounting and determine the rights and equities of the parties. *Boothe v. Summit Coal Mining Co.* 630

3. SAME — RESCISSION — SALE OF PROPERTY — NECESSITY. Where an action is brought by one of two equal stockholders of a corporation, the plaintiff alleging his exclusion from control, and mismanagement and failure to account by the defendant, and a receivership and accounting is asked, it is error to order a receiver's sale of all the assets of the corporation, consisting of real estate and mining machinery, before the accounting is had and the rights and equities of the parties are adjudicated, where there appears no probable depreciation in the value of the property, especially where the defendant is indebted to the corporation, and has not made payments

CORPORATIONS—CONTINUED.

ordered by the court, and the plaintiff would be at a disadvantage in bidding at the sale until the purposes of the receivership have been accomplished. *Boothe v. Summit Coal Mining Co*..... 630

4. CORPORATIONS — TRANSACTION BETWEEN MEMBER AND COMPANY — DEEDS—FAILURE OF CONSIDERATION—CANCELLATION. Where a deed by a stockholder to an irrigation company, made in good faith upon the advice of an attorney, in consideration of water rights for certain lands, is held void as against public policy, and the consideration fails through inability of the company to furnish the water, the grantor is entitled to a reconveyance of the land. *Pederson v. North Yakima & East Selah Irrigation Co*..... 636

5. CORPORATIONS—MANAGEMENT—EMPLOYMENT OF STOCKHOLDER—DISCHARGE. A stockholder transferring stock in consideration of an agreement that he be employed as sales agent may be discharged from such position for inefficiency. *Winsor v. Commonwealth Coal Co.* 62

6. CORPORATIONS—MANAGEMENT—POOLING STOCK — VALIDITY OF CONTRACT—PUBLIC POLICY. A pooling contract for the voting of corporate stock is not void as against public policy, because of provisions in the agreement relating to the employment of an agent and the election of a director, where there was no fraud and nothing unlawful about it and nothing which necessarily affected the rights of minority stockholders. *Winsor v. Commonwealth Coal Co*... 62

7. CORPORATIONS — OFFICERS — EMPLOYMENT — DISCHARGE — SALE OF STOCK—CONSIDERATION. Where a stockholder sold a controlling interest in the stock in consideration of $1,000 and of a contract to employ him as secretary for one year, the obligation is mutual and he is subject to discharge for diverting property and violating the by-laws, and cannot recover the value of his stock for failure of consideration. *Badere v. Goodrich*..... 650

8. CORPORATIONS—EMPLOYMENT OF OFFICER — CONTRACT — BREACH — LIABILITY OF STOCKHOLDER. Majority stockholders are not liable for the wrongful discharge by the corporation of one of its officers. *Badere v. Goodrich*..... 650

9. SAME—DISCHARGE—RECOVERY FOR SERVICES. Upon the dismissal for good cause of an officer of a corporation employed for one year, his recovery is limited to *quantum meruit* for the service rendered up to the time of the discharge. *Badere v. Goodrich*..... 650

10. CORPORATIONS—ACTIONS BY—CAPACITY TO SUE—PAYMENT OF LICENSE FEE. The act prohibiting any corporation from commencing or maintaining any suit or action without alleging and proving that it has paid its annual license fee should be enforced by the courts as a license tax or revenue measure; and hence judgment for defendant on a counterclaim, in an action between two corporations,

CORPORATIONS—CONTINUED.

should be reversed and the action dismissed where neither corporation proved its capacity to sue, although the objection was not specially urged against the corporation in whose favor the judgment was rendered. *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition* 376

CORROBORATION:

Of female in prosecution for rape, see RAPE.

COSTS:

Construction of agreement to pay costs and expenses of suit, see CONTRACTS.

1. COSTS—ON APPEAL—ALLOWANCE. Upon the reduction of an excessive judgment entered through the error of respondent, appellant will be allowed the costs on appeal. *National Grocery Co. v. Simmons* 264

2. COSTS—ON APPEAL. On appellant's obtaining a substantial reduction of the judgment, he will be entitled to costs on appeal. *Maezini Society v. Corgiat* 273

3. COSTS—ON APPEAL—PARTIES ENTITLED—DISCRETION OF COURT. In an action to vacate a judgment for want of jurisdiction and cancel an assessment for benefits, in which the trial court erroneously rejected respondents' offer of evidence to overcome the presumption of jurisdiction, upon objection made by the city, but also erroneously vacated the judgment as void on its face, upon appeal by the city and reversal with remand to receive the evidence excluded at appellant's instance, the costs on appeal are within the discretion of the appellate court, under Rem. & Bal. Code, § 1744, and will be awarded to the respondents, since they were forced into the appellate court wholly without fault. *Michaelson v. Seattle* 230

COUNTERCLAIM:

In action for price of goods sold, see SALES, 7, 10, 11.

COUNTIES:

Authority to levy assessment on lands benefited by ship canal as enacting class legislation, see CONSTITUTIONAL LAW, 3, 4.

Authority to county to levy assessment for improvement as imposition of tax by state, see TAXATION, 2.

1. COUNTIES—IMPROVEMENTS—POWER TO MAKE. The limitations of Const., art. 7, § 8, upon the power of cities, towns, and villages, to make local improvements has no application to counties. *Bilger v. State* 457

2. COUNTIES — OFFICERS — ASSESSMENT — COMMISSIONERS. Commissioners to equalize a county assessment for the construction of a

COUNTIES—CONTINUED.

ship canal are not county officers, within Const., art. 11, § 5, requiring that all county officers be elected, and accordingly they may be appointed. *Bilger v. State*..... 457

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.
Contempt of court, see CONTEMPT.
Jurisdiction to enforce payment of alimony, see DIVORCE, 5.
Motion for new trial, extending time of, see NEW TRIAL.
Review of assessment of tax, see TAXATION, 6.
Province of court and jury, see TRIAL, 1, 8.
Equitable relief, see TRUSTS.
Jurisdiction of place of trial, see VENUE.

1. COURTS — RULES — OBSERVANCE — DISCRETION. It is discretionary with the trial court to require the observance of a local rule of court requiring motions to be accompanied by an affidavit that the attorney believed the motion to be meritorious. *Sylvester v. Olson* 285

2. COURTS—PROBATE COURTS—EQUITABLE ISSUES—EXECUTORS AND ADMINISTRATORS—FEES. The superior court, sitting in probate, may exercise its equity powers, and having framed and tried an issue to try title, may, on final decree, allow administrators' and guardians' fees not covered by the pleadings on such issue. *Sloan v. West*. 623

3. COURTS—JURISDICTION — CONSENT OF PARTIES — RECORD — STIPULATION TO DISMISS ACTION—ATTORNEY'S FEES—PROHIBITION. Where the parties to an action stipulated that it be dismissed upon the conveyance to trustees of part of the property in dispute, the trustees to pay plaintiff's attorneys, on their contingent fees, whatever sum might be allowed or determined in their favor, the court has no jurisdiction in the pending case to determine the amount of the fees without service of process or further pleadings, by reason of the fact that the trustees joined in the stipulation and were present or represented at the hearings, where they did not appear and consent thereto, but objected to the jurisdiction of the court; and prohibition lies to prevent proceedings in the action to determine the amount and enforce payment of the attorney's fees. *State ex rel. Bogle v. Superior Court*..... 96

4. COURTS — JURISDICTION — DETERMINATION — CONCLUSIVENESS. The decision of a court that it has jurisdiction to determine the contingent fees of plaintiff's attorneys is not conclusive, where it was based on statements made to the court and a stipulation for dismissal of the action, and the record shows that the court had no jurisdiction over the parties objecting thereto. *State ex rel. Bogle v. Superior Court*..... 96

CREDIT:

On judgment of sums paid for support of children pending appeal, see DIVORCE, 3.

CREDITORS:

See ASSIGNMENTS FOR CEDITORS.

CRIMINAL LAW:

See CONTEMPT; GAMING; LARCENY; LIBEL AND SLANDER, 1, 2; PERJURY; RAPE.

Practicing medicine without license, see PHYSICIANS AND SURGEONS.

1. CRIMINAL LAW — PROSECUTIONS — STATUTES — REPEAL — SAVINGS CLAUSE. Offenses prior to the enactment of the new penal code (Rem. & Bal. Code, § 2753 *et seq.*), are properly prosecuted under the laws in force at the time the offense was committed, being expressly saved by the repealing clauses of the later enactment. *State v. Morrow* 297

2. CRIMINAL LAW—EVIDENCE—IDENTIFICATION—OPINIONS. The identification of a person need not be positive and certain, but the witness may state that she believes that the accused is the person who committed the crime. *State v. Morrow*..... 297

3. CRIMINAL LAW—COMPLAINT—DEMURRER. A demurrer to a complaint for criminal libel only admits the facts alleged and not the pleader's conclusions. *State v. Darwin*..... 303

4. CRIMINAL LAW — TRIAL — MISCONDUCT OF COUNSEL. Prejudicial error cannot be predicated on an improper insinuation of the prosecuting attorney on cross-examination of the defendant's witness, where an objection thereto was promptly sustained and the jury were instructed to disregard it. *State v. Smails*..... 172

5. CRIMINAL LAW—TRIAL—MISCONDUCT OF WITNESS—TIME FOR OBJECTION. An objection that the regular superior court judge of the county, who was a witness for the state, was guilty of improper conduct in mingling with the other witnesses and manifesting an interest in the prosecution, comes too late when first made on motion for a new trial. *State v. Smails*..... 172

6. CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE. In a prosecution for practicing medicine without a license, it is not error that, on cross-examination of the prosecutrix, who was asked if the defendant took her temperature, the court refused to strike out the answer, "No she used a vibrator on me;" especially where the defendant later testified to having used a vibrator. *State v. Greiner*..... 46

7. CRIMINAL LAW—RECEPTION OF EVIDENCE. A witness should not be permitted to state his impression after he had testified that it was so long ago that he could not swear to the answer to the question. *State v. Smails*..... 172

8. CRIMINAL LAW—INSTRUCTIONS—LEGAL EFFECT OF CHARGE. In instructions defining the charge of practicing medicine without a license, it is not error to state the legal effect of the complaint, rather than follow its language. *State v. Greiner*..... 46

CRIMINAL LAW—CONTINUED.

9. CRIMINAL LAW—TRIAL—INSTRUCTIONS AS LAW OF CASE—PERJURY. Where, upon a trial for perjury, the court instructed the jury that all the testimony given by the accused in a civil action was material to the issue thereon, and the same was not excepted to, it became the law of the case, and error cannot be predicated on other instructions authorizing the jury to convict if they find that the accused gave the testimony as charged or "some substantial part of it." *State v. Smails*..... 172

10. CRIMINAL LAW—NEW TRIAL—TIME FOR MOTION. A second motion for a new trial, made after appeal taken and pending the hearing in the supreme court, is untimely and cannot be considered. *State v. Smails* 172

11. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR. On a trial for robbery, error in excluding the accused's explanation of what he did between the time of the transaction and his arrest is not prejudicial, where there was no evidence of flight. *State v. Brache*.. 396

12. CRIMINAL LAW—TRIAL—WITNESS—OMISSION OF OATH. It is not prejudicial error that by inadvertence a witness gave part of his testimony without being sworn, where it was immediately withdrawn, and repeated after the witness was sworn. *State v. Morrow* 297

13. CRIMINAL LAW—APPEAL—RECORD—MISCONDUCT OF COUNSEL. Error cannot be predicated upon improper argument of counsel to the jury, where it was not preserved in the record on appeal, and no motion was made below to strike it or to instruct the jury to disregard it. *State v. Smails*..... 172

14. CRIMINAL LAW—APPEAL—RECORD—INSTRUCTIONS—EXCEPTIONS. Error cannot be predicated upon the instructions where the record on appeal does not include the instructions or any exception thereto. *State v. Morrow*..... 297

CROSS-EXAMINATION:

See WITNESSES.

CROSSINGS:

Breach of stipulation to maintain, see RAILROADS, 2-4.

Negligence in making flying switch at crossing, see RAILROADS, 5, 6.

CRUELTY:

Ground for divorce, see DIVORCE, 1.

CUSTOM:

Of carpet dealers in displaying goods on smooth hard wood floor, see NEGLIGENCE, 1.

In furnishing water for irrigation, see WATERS AND WATER COURSES, 4, 5.

DAMAGES:

See LIBEL AND SLANDER, 3.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 4-9.
Unlawful detainer of demised premises, see LANDLORD AND TENANT, 10, 11.
Recovery by owner for defective material, in action to foreclose lien, see MECHANICS' LIENS, 6.
Injuries caused by public improvements, see MUNICIPAL CORPORATIONS, 4-8.
Breach of stipulation to maintain crossing, see RAILROADS, 2-4.
Breach by seller of contract for sale of goods, see SALES, 7, 10, 11.
For breach of warranty, see SALES, 7, 11.
Findings by court in civil action, see TRIAL, 9.
For fraud inducing sale, see VENDOR AND PURCHASER, 1, 6.

1. DAMAGES—STIPULATED DAMAGES—CONSTRUCTION OF CONTRACT. A provision for drastic stipulated damages will not be extended by construction to embrace matters not clearly within its terms. *Clemons v. Grays Harbor & Puget Sound R. Co*..... 38

2. DAMAGES—STIPULATED DAMAGES—PENALTY. A provision in a right of way deed whereby the grantee agreed to pay $1,000 a day for each day it interfered with the operation of an intersecting logging road, as liquidated damages and not as a forfeiture or penalty, is an agreement for stipulated damages. *Clemons v. Grays Harbor & Puget Sound R. Co*..... 38

3. DAMAGES—BREACH OF CONTRACT—SALE OF MORTGAGE. On a trade of property, in which the defendant agreed to assign a mortgage constituting a first lien on real estate, of the face and actual value of $658, which was received in lieu of so much money, the measure of damages for failure to assign the mortgage is the amount thereof, and not the difference between the actual value and the face value of a purported mortgage note for that sum, delivered at the time of the trade, but not mentioned in the contract or considered by the parties. *Wilson v. Clark*..... 136

4. DAMAGES — EXCESSIVE VERDICT — LOSS OF HAND. A verdict for $8,500 for the loss of a right hand by a boy under fourteen years of age will not be set aside as excessive, where the trial court refused to interfere. *Glucina v. Goss Brick Co*..... 401

DEATH:

Insufficient evidence as to cause of, see MASTER AND SERVANT, 4.
Wrongful death caused by operation of railroad, see RAILROADS, 5, 6.

DEBT:

Promise to pay debt of another, see FRAUDS, STATUTE OF, 1.
Form of judgment against joint debtors, see JUDGMENT, 1.
Liability of new debtor, see NOVATION.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

DECISION:

On appeal, see APPEAL AND ERROR, 38, 39.
Of courts in general, see COURTS.
Review on appeal, see DIVORCE, 2.
Conclusiveness of decision respecting claim to newspaper advertising reward, see REWARD.

DEDICATION:

1. DEDICATION — STREETS — BOUNDARIES — INTENT — PRESUMPTION. Where a plat plainly marked the boundaries of two parallel streets of specified widths, and showed an intervening space of twenty feet between the streets, marked "R. R.," which was occupied at the time by a street railway, a dedication of the public streets as marked does not include the intervening space, since an intention to dedicate will not be presumed and does not appear; and a clause reserving from streets dedicated, the 20-foot strip marked "R. R." will not defeat the expressed intent not to dedicate such strip. *Provident Trust Co. v. Spokane*..... 92

DEEDS:

Conveyances between stockholder and corporation, see CORPORATIONS, 4.
From state for oyster lands, see FISH.
Transfer of reversion of leased premises as giving right to accrued rent, see LANDLORD AND TENANT, 4.
Construction of provisions in right of way deed, see RAILROADS, 2.
Reformation, see REFORMATION OF INSTRUMENTS.
Demand for by vendee, see VENDOR AND PURCHASER, 3, 4.
Time for delivery by vendor, see VENDOR AND PURCHASER, 5.
Venue of action to reform deed, see VENUE.

1. DEEDS—EXECUTION IN BLANK—DELIVERY. The execution and delivery of a deed in blank authorizes the party to whom it was intrusted to fill in the name of a grantee and vests title in the grantee. *Clemmons v. McGeer*..... 446

2. DEEDS — VALIDITY — MENTAL CAPACITY — EVIDENCE — SUFFICIENCY. Deeds and a bill of sale disposing of all the grantor's property during his last illness, and in view of approaching death, will not be set aside at the suit of persons as to whom there was no more than a bare possibility of heirship, and there was only the most meager testimony of mental incapacity on the part of the grantor, consisting principally of statements attributed to the physician that he was in a "dying condition," witnesses testified to his competency, and the witnesses to the deed were not called. *Spackman v. Webb*..... 5

DEFAULT:

Payment of rent by lessee, see LANDLORD AND TENANT.

DEFECT:

Replacing defective material, see MECHANICS' LIENS, 3, 4.
In plans causing injury to property, see MUNICIPAL CORPORATIONS, 3.
Of parties defendant, see PARTIES.
In affidavit for publication, see PROCESS.

DELAY:

In performance by vendor as ground for rescission, see VENDOR AND PURCHASER, 3, 4.

DELIVERY:

Of deed in blank, see DEEDS, 1.
Duplicate statement to owner of material furnished contractor, see MECHANICS' LIENS, 5.
Of deed by vendor, see VENDOR AND PURCHASER, 5.

DEMAND:

By lessee for possession, see LANDLORD AND TENANT, 9.
By vendee for deed, see VENDOR AND PURCHASER, 3, 4.

DEMURRER:

To criminal complaint, see CRIMINAL LAW, 3.
In pleading, see PLEADING.

DEPARTURE:

In pleading, see PLEADING, 3.

DEPOSITS:

In bank, see BANKS AND BANKING.

DESCENT AND DISTRIBUTION:

See EXECUTORS AND ADMINISTRATORS; WILLS.
Escheat of property on failure to show heirship, see ESCHEAT.

DILIGENCE:

Of purchaser in ascertaining defects, see SALES, 8.

DISCHARGE:

From indebtedness, see ACCORD AND SATISFACTION.
Of debtor, see ASSIGNMENT FOR CREDITORS.
Of corporate officer or employee, see CORPORATIONS, 5, 7-9.
Of mortgage lien by partial release, see MORTGAGES, 1.
Of police officer, see MUNICIPAL CORPORATIONS, 1.
Substitution of new debtor, see NOVATION.

DISCRETION:

Of insurance commissioner to designate newspapers for publication of insurance reports, see NEWSPAPERS.

DISCRETION OF COURT:

Review of discretionary action in granting new trial, see APPEAL AND ERROR, 26.

Costs on appeal, see COSTS, 3.

To require compliance with local rules of court, see COURTS, 1.

Refusing requested instruction, see TRIAL, 5.

DISMISSAL AND NONSUIT:

Service of affidavit on motion to dismiss appeal, see APPEAL AND ERROR, 20.

Waiver of right to allege error in ruling on motion for nonsuit, see APPEAL AND ERROR, 24.

Construction of stipulation for dismissal of action and payment of attorney's fees, see STIPULATIONS.

At trial, see TRIAL, 1, 2.

DIVERSION:

Of surface waters, see WATERS AND WATER COURSES, 1.

DIVORCE:

Interest on decree, see INTEREST.

1. DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY. A husband is guilty of cruelty warranting a divorce, where it appears that he had community property of the value of $10,000 to $12,000 upon which he could have borrowed funds, that when their first child was born, he placed his wife in a hospital as a charity patient, and on her parents removing her to a private hospital, he made no effort to see her for five weeks, no explanation of his conduct was made, and there was also want of proper support. *Gould v. Gould*..... 484

2. DIVORCE—APPEAL—DECISIONS REVIEWABLE—APPEAL FROM PART OF DECREE. A wife to whom property is awarded on a divorce cannot appeal from that part of a decree awarding the divorce, without also appealing from the award of the property to her, in view of Rem. & Bal. Code, § 989, which makes a division of the property ancillary to the power to grant the divorce; since the statute, § 996, only authorizes an appeal from a disposition of the property without appeal from the decree of divorce. *Wilkinson v. Wilkinson*..... 126

3. DIVORCE—ALIMONY—PAYMENT—CREDITS — CONTRACTS — CONSTRUCTION. Where, on appeal from a decree of divorce awarding a sum of money in lieu of property, and $25 per month for the support of children, the appellant agreed to pay $65 for the support of the children pending the appeal in consideration of an agreement not

DIVORCE—CONTINUED.

to issue execution on the judgment, the increased payments cannot be credited on the judgment, since they are supported by an independent consideration. *Smith v. Smith*..... 288

4. DIVORCE—DECREE FOR ALIMONY — ENFORCEMENT — PROCEEDINGS — PARTIES—CONTEMPT. A show cause order to enforce a decree for alimony is properly entitled in the divorce case, as the same is an equitable proceeding in aid of the court's original jurisdiction, and not a contempt proceeding to be prosecuted as a criminal case in the name of the state, under Rem. & Bal. Code, § 1054; although the order was to show cause or be adjudged in contempt. *Poland v. Poland* 597

5. SAME—JURISDICTION. The jurisdiction of the court in a divorce case to enforce the payment of alimony awarded for the support of children is a continuing one, without the necessity of another action to collect payments past due. *Poland v. Poland*..... 597

DOMICILE:

For purposes of administration of estate, see EXECUTORS AND ADMINISTRATORS, 1, 2.

1. DOMICILE—HUSBAND AND WIFE—RIGHT OF WIFE—REMOVAL OF DISABILITIES. Rem. & Bal. Code, § 5926, removing all the civil disabilities of a married woman was not intended to authorize a wife to establish a domicile for herself, irrespective of her husband's domicile, during the existence of the marital relation. *Buchholz v. Buchholz* 213

2. DOMICILE—HUSBAND AND WIFE—ABANDONMENT—RIGHT OF WIFE. The evidence shows an abandonment of the marriage relation, and of the husband's right to fix the domicile of his wife, which she may thereupon establish for herself, where it appears that they had been separated for several years and lived in different counties, the husband had leased his home for a term of five years to a widow in consideration of "boarding and lodging," had stated that he would have nothing to do with his wife, and did not visit her during her last sickness or attend her burial. *Buchholz v. Buchholz*... 213

DRAINS:

Appeal in proceedings to condemn for dikes, see EMINENT DOMAIN, 10.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 4.

Summary punishment of contempt as denial of due process of law, see CONTEMPT, 5.

EASEMENTS:

Right to in state lands, see EMINENT DOMAIN, 3.
State grant to government to lower waters of lake for ship canal, see NAVIGABLE WATERS, 1-3.

EDUCATION:

Creation of charitable trust for purpose of, see CHARITIES.

EJECTMENT:

Joinder of cause of action for in suit to quiet title, see ACTION, 1.
Fraud in obtaining title to oyster lands as defense to ejectment against persons in possession under oyster land deed, see FISH, 2.

1. EJECTMENT—PLEADING — COMPLAINT — TITLE AND POSSESSION. A complaint to recover the possession of real estate, setting forth the nature of plaintiffs' title, as required by Rem. & Bal. Code, § 793, is sufficient without alleging that the plaintiffs were seized and possessed of the premises within the statutory period for commencing the action. *Wilkeson v. Miller* 680

ELECTION:

Parties defendant, see PARTIES.

ELECTRICITY:

1. ELECTRICITY—SUPPLY—ACTION FOR PRICE—CONTRACT—METHOD OF CALCULATION—DEFENSES. Where the amount due from a railroad company to a power company for electric current was calculated in one of the two methods provided for in the contract, the railroad company cannot be heard to say that it was not a proper method; and it is immaterial that bills rendered for current varied slightly from the evidence, under an accurate computation by instruments as against computations by eye reading at the time the bills were prepared. *Seattle, Renton & Southern R. Co. v. Seattle-Tacoma Power Co.* 639

2. SAME—DEFENSES. Where a railroad company, a heavy consumer of electric current, never tested a meter for accuracy, as it might have done under its contract for power, in an action for the price of current, little credit should be given to its claim of inaccuracy of the meter. *Seattle, Renton & Southern R. Co. v. Seattle-Tacoma Power Co.* 639

3. SAME—SUPPLY—PERFORMANCE OF CONTRACT. The fact that the voltage dropped a little below that required by a contract for electric current, on a few occasions, is no defense to an action for the price, where the consumer was not damaged by lack of power and received all the current it required. *Seattle, Renton & Southern R. Co. v. Seattle-Tacoma Power Co.* 639

ELECTRICITY—CONTINUED.

4. ELECTRICITY—NEGLIGENCE — EVIDENCE — PRESUMPTIONS — TRIAL — QUESTION FOR COURT. Where plaintiff's case rested upon the legal presumption of the negligence of the defendant in allowing one of its high-power wires to fall from its support, plaintiff showing no cause for the fall of the wire, and the defendant's evidence showed that the power wire had just been knocked down by the breaking of a cable employed by the city in construction work on the street, which evidence was not controverted, there is no issuable fact for the jury, and the defendant was not guilty of negligence, as a matter of law; a presumption of law not being evidence of a fact or effective in the face of the opponent's *prima facie* evidence. *Scarpelli v. Washington Water Power Co*..... 18

EMINENT DOMAIN:

Conclusiveness of judgment in condemnation, see JUDGMENT, 5.
Taking part of premises in condemnation as eviction of tenant, see LANDLORD AND TENANT, 2.
Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 2-8.

1. EMINENT DOMAIN—PROPERTY SUBJECT—STATE SCHOOL LANDS. Rem. & Bal. Code, § 7768 *et seq.*, is not unconstitutional in providing for the condemnation of lands granted by the United States to the state for school purposes; since the sale of school lands is authorized by Const., art. 1, § 16, providing that the same shall not be disposed of except for the full market value. *Roberts v. Seattle*..... 573

2. SAME—LANDS DEVOTED TO PUBLIC USE—UNIVERSITY GROUNDS. A thirty-foot strip off the state university grounds may be condemned for a street, and it cannot be objected that it is already devoted to a public use, where there is nothing in the record to indicate that it was actually used by the university, and the record shows that the land remaining will be benefited thereby. *Roberts v. Seattle*... 573

3. SAME—OBJECTIONS—STATE LAND IN USE—EASEMENTS. That state lands were already in use as a street is no objection to condemnation proceedings to acquire the same for a permanent street; since an easement cannot be acquired upon state land. *Roberts v. Seattle* 573

4. EMINENT DOMAIN—COMPENSATION — ASSESSMENTS FOR BENEFITS. An act authorizing the assessment of property benefited by a local improvement relates to the taxing power, and not to the taking or damaging of private property for a public use without compensation, prohibited by Const., art. 1, § 16. *Bilger v. State*..... 457

5. EMINENT DOMAIN—DAMAGES—LEASEHOLDS—RENEWALS—VALUE—DETERMINATION—TERMS OF LEASE—ARBITRATION. Where a lease provided for a renewal for five years at a rental to be agreed upon or

EMINENT DOMAIN—CONTINUED.

fixed by arbitrators, at the option of the lessee, and the fee was acquired by a public service corporation, which refused to consent to an extension for longer than eighteen months, and refused at all times to agree upon the rental or arbitrate the matter, but commenced a condemnation suit to appropriate the leasehold, the court cannot, eleven months after expiration of the original term, require an arbitration at that time within one day pending a stay of the trial, and in default thereof, take evidence and fix the value of the rental, in disregard of the method prescribed in the lease, the lease contemplating an adjustment of the rent before the expiration of the original term. *North Coast R. Co. v. Kraft Co*..... 250

6. SAME. In such case, the rights of the tenant in the condemnation suit can only be protected by adhering to the view that the rent reserved in the lease continued for the renewal term, especially in view of the fact that the relator's agent demanded and collected one month's rent at such rate, and the lessee tendered the same each month, while the relator at all times refused to comply with the terms of the lease requiring it to agree upon or arbitrate the matter of the rent. *North Coast R. Co. v. Kraft Co*..... 250

7. SAME—VALUE OF LEASEHOLD—EXPENSE OF REMOVAL — EVIDENCE. In proceedings to condemn a leasehold, while the lessee's expense of moving to a new place and damage to stock and fixtures therefrom is not recoverable as specific items apart from the leasehold, evidence thereof is admissible as showing the value of the unexpired term. *North Coast R. Co. v. Kraft Co*..... 250

8. SAME—RESTRICTIONS IN LEASE. In proceedings to condemn a leasehold, the rental value of the unexpired term cannot be measured by "the highest and best use" of the premises, where the lease restricts its use to a specified business. *North Coast R. Co. v. Kraft Co.* 250

9. SAME—MEASURE OF DAMAGES TO A LEASEHOLD. In proceedings to condemn a leasehold, the measure of damages is the difference between the rent reserved and the rental value during the remainder of the term, plus loss of profits while moving to a new location. *North Coast R. Co. v. Kraft Co*..... 250

10. EMINENT DOMAIN—DRAINS — APPEAL — REVIEW — QUESTIONS REVIEWABLE. Under Rem. & Bal. Code, § 4107, providing that an appeal from any judgment of damages or any assessment of benefits in condemnations for dikes shall bring before the supreme court the propriety and justness of the amount of damages or assessment, errors going to the validity of the organization of the district or regularity of the proceedings leading up to the judgment of condemnation cannot be considered on appeal from the final judgment. *Calispel Diking District v. McLeish*..... 331

EMPLOYEES:

See MASTER AND SERVANT.
Of corporation, see CORPORATIONS, 5-9.
Discharge of police officer, see MUNICIPAL CORPORATIONS, 1.

ENTRY:

Form of judgment against joint tenants in action for rent, see JUDGMENT, 1.

EQUITY:

See REFORMATION OF INSTRUMENTS; TRUSTS.
Cancellation of deed, see DEEDS, 2.

ESCHEAT:

1. ESCHEAT—WANT OF HEIRS—EVIDENCE—SUFFICIENCY. The state cannot claim an escheat merely because parties failed to show that they were heirs of the deceased. *Spackman v. Webb*..... 5

ESTABLISHMENT:

Of disputed boundary, see BOUNDARIES.
Of domicile by husband or wife, see DOMICILE.
Of trusts, see TRUSTS.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.
Trusts, see TRUSTS.

ESTOPPEL:

To assert adverse possession, see ADVERSE POSSESSION, 3.
To allege error, see APPEAL AND ERROR, 23.
To dispute fees of administration, see EXECUTORS AND ADMINISTRATORS, 4.
By former judgment, see INDEMNITY; JUDGMENT, 4, 5.
Of tenant to assert notice in unlawful detainer as premature, see LANDLORD AND TENANT, 8.
Of lien claimant to assert lien against purchasers after release to owner, see MECHANICS' LIENS, 2.
Of property owners to attack assessment, see MUNICIPAL CORPORATIONS, 6.
To maintain action to reform deed, see REFORMATION OF INSTRUMENTS, 3.
To rescind sale for breach of warranty, see SALES, 6.
To evade liability for loss of goods, see WAREHOUSEMEN.

EVICTION:

Of tenant of demised premises, see LANDLORD AND TENANT, 2, 9.

EVIDENCE:

See ADVERSE POSSESSION, 2-4; LARCENY; NEGLIGENCE; PARTNERSHIP; PERJURY; RAPE; REFORMATION OF INSTRUMENTS; WITNESSES.
Of mutual settlement of claim or account, see ACCORD AND SATISFACTION.
Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 13, 14.
Review, harmless error in rulings on, see APPEAL AND ERROR, 30, 31.
Fraud of attorney in dealings with client, see ATTORNEY AND CLIENT.
To show conditional indorsement and delivery of check by depositor, see BANKS AND BANKING, 2.
On note, see BILLS AND NOTES, 2, 3.
Location of boundary, see BOUNDARIES.
Of fraud in purchase of corporate stock, see CORPORATIONS, 1.
To identify accused, see CRIMINAL LAW, 2.
Reception at trial in general, see CRIMINAL LAW, 6, 7.
Mental capacity of grantor to execute deed, see DEEDS, 2.
Of cruelty, see DIVORCE, 1.
Wife's right to fix domicile, see DOMICILE, 2.
Of negligence in allowing fall of electric wire, see ELECTRICITY, 4.
Condemnation proceedings, see EMINENT DOMAIN, 7.
To show escheat, see ESCHEAT.
Community nature of property, see HUSBAND AND WIFE, 8, 11, 12.
Parol to show scope and issues on former judgment, see JUDGMENT, 4.
For recovery of premises demised, see LANDLORD AND TENANT, 7.
To support malicious prosecution, see MALICIOUS PROSECUTION.
Existence of marriage relation, see MARRIAGE.
For injuries to servant in general, see MASTER AND SERVANT, 4, 6, 7, 15-17.
Materials furnished and used in public improvement, see MUNICIPAL CORPORATIONS, 2.
Ownership of wagon colliding with pedestrian in city street, see MUNICIPAL CORPORATIONS, 9.
Practice of medicine without license, see PHYSICIANS AND SURGEONS.
To show negligence in setting of fire by locomotive, see RAILROADS, 8.
Fraud in inducing sale, see SALES, 1, 2; VENDOR AND PURCHASER, 1.
Questions of fact for jury, see TRIAL, 1, 3.
Undue influence, see WILLS, 1.
Testamentary capacity, see WILLS, 2, 3.

1. EVIDENCE—PHOTOGRAPHS—IDENTIFICATION—NECESSITY. Upon the second trial of a cause, it is error to admit in evidence a newspaper photograph of the scene of the accident upon the statement of the trial judge that he recognized it as a duplicate of an exhibit used on the former trial and identified by evidence on the former trial, where there was no evidence identifying the same as a duplicate of the exhibit in question, and it was concededly not such duplicate. *Pantages v. Seattle Electric Co*..... 159

EVIDENCE—CONTINUED.

2. EVIDENCE — PAROL TO VARY WRITING — COLLATERAL AGREEMENT. Where a written lease appears to have been carefully prepared after consideration of many questions in regard to the property, the lessor agreeing to do nothing except deliver possession and the lessee agreeing to accept the premises as they then were and make all necessary repairs to the interior, evidence is inadmissible of an alleged oral contemporaneous agreement whereby the lessor was to make certain alterations in case of change of street grade; since it is not a collateral agreement, but was a necessary part of the letting which should have been included in the lease. *Hockersmith v. Ferguson* 581

3. EVIDENCE—EXPERTS—OPINIONS—FORGERY. Bankers and accountants of long standing having an extended experience in dealing with commercial paper and detecting irregularities therein are qualified to express their opinions as to the forgery of a note and mortgage. *State v. Smails* 172

4. SAME—EXPERT TESTIMONY—SUBJECTS—FORGERY BY ADDITIONS. It is competent for experts to express an opinion as to whether certain words and figures upon a note and mortgage were added or written at a different time, with a different pen or ink or under different circumstances from the other parts of the writing thereon. *State v. Smails* 172

EXAMINATION:

Of expert witnesses, see EVIDENCE, 3, 4.
Of witnesses in general, see WITNESSES.

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 2-4; CRIMINAL LAW, 13, 14.
In mortgage as affecting rights previously contracted for, see MORTGAGES, 2.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 14.

EXCESSIVE DAMAGES:

See DAMAGES, 4; LIBEL AND SLANDER, 3.

EXCHANGE OF PROPERTY:

Fraud in trade of property, see FRAUD.

EXECUTION:

See ATTACHMENT.
Effect of execution and delivery of deed in blank, see DEEDS, 1.

EXECUTORS AND ADMINISTRATORS:

Allowance of fees for on trial of equitable issue, see COURTS, 2.
Petition for letters testamentary on estate of wife as admission of community nature of property, see HUSBAND AND WIFE, 12.

1. EXECUTORS AND ADMINISTRATORS—JURISDICTION—DOMICILE OF WIFE —"RESIDENT." Rem. & Bal. Code, § 1284, providing that administration shall be first granted in the county in which the deceased was a resident or had his place of abode, means a "residence" in the strict legal sense, so that the domicile of a wife, under normal conditions, follows that of her husband for the purposes of administration. *Buchholz v. Buchholz*..... 213

2. EXECUTORS AND ADMINISTRATORS — JURISDICTION — HUSBAND AND WIFE—DOMICILE OF WIFE. Where a husband has deserted his wife and has established a separate domicile, jurisdiction to probate the wife's estate depends upon her own domicile. *Buchholz v. Buchholz* 213

3. EXECUTORS AND ADMINISTRATORS—ALLOWANCES TO WIDOW—JURISDICTION—NONINTERVENTION WILL—WITHDRAWAL OF ESTATE FROM ADMINISTRATION. The probate court has no jurisdiction to order an allowance to a widow, upon the settlement of an estate under a "nonintervention" will, within Rem. & Bal. Code, § 1444, authorizing such settlement without the intervention of any court; and the statutory provisions with reference to the widow's use of the homestead and other articles, exemptions, and a money allowance, in the case of estates settled through probate proceedings have no application; the two methods of settlement being distinct. *In re Guye's Estate* 167

4. EXECUTORS AND ADMINISTRATORS — FEES — ESTOPPEL TO DISPUTE. Where a man allowed his property to be brought into probate as community property and to remain there several years, employing attorneys and availing himself of the services of an administrator and guardian *ad litem*, the fees and expenses are properly charged to the property, although it was found in an equitable issue, framed to try title, that it was not community property, and that there was no property of the deceased for distribution. *Sloan v. West*..... 623

5. EXECUTORS AND ADMINISTRATORS—ACTIONS—JOINDER OF PARTIES—LANDLORD AND TENANT—SURVIVORSHIP—LIABILITY FOR RENT—JOINT OBLIGATIONS. An action for rent may be maintained against the executors of a deceased joint tenant, without showing the insolvency of the survivor, as required at common law, in view of the statute abolishing the doctrine of survivorship between joint tenants, and the reform procedure of the code providing a single form of action, to be prosecuted by and against the real parties in interest, or their executors or administrators in case of actions on contract, and prescribing the form of judgments and the relief to be granted in actions against joint debtors, etc. *Brownfield v. Holland*..... 86

EXECUTORS AND ADMINISTRATORS—CONTINUED.

6. EXECUTORS AND ADMINISTRATORS — ACTIONS — CLAIMS — TITLE OF CLAIM. An objection that a claim against an estate was not properly entitled and was insufficient to support an action, is of no avail where the title was not misleading, the verification conformed to the statute, and the claim was rejected. *Brownfield v. Holland* 86

EXEMPTION:

Waiver of exemption from assessments for street improvement, see SCHOOLS AND SCHOOL DISTRICTS.

EXHIBITS:

As part of record on appeal, see APPEAL AND ERROR, 17.
As evidence, see EVIDENCE, 1.

EXPENSES:

Against estate, see EXECUTORS AND ADMINISTRATORS, 4.
Loss of services and expense in treatment of minor son, see PARENT AND CHILD.

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 3, 4.

EXTENSIONS:

Time for motion for new trial, see NEW TRIAL.

EXTRINSIC EVIDENCE:

To show conditional indorsement and delivery of check to bank, see BANKS AND BANKING, 2.
In civil actions, see EVIDENCE, 2.
To prove issues and scope of former judgment, see JUDGMENT, 4.

FACTORY ACT:

Duty to guard machinery and appliances, see MASTER AND SERVANT, 2, 3, 11, 15, 18.

FALSE REPRESENTATIONS:

See FRAUD.

FALSE SWEARING:

See PERJURY.

FEES:

Of attorney, see CONTRACTS.
Expenses of administration, see EXECUTORS AND ADMINISTRATORS, 4.
Of attorney, stipulation for payment, see STIPULATIONS.

FILING:

Proposed statement of facts, see APPEAL AND ERROR, 15, 16.
Time for filing notice of claim, see MECHANICS' LIENS, 3.

FINDINGS:

Review on appeal, see APPEAL AND ERROR, 2-4, 27-29.
Special findings of jury in action for injury to servant, see MASTER AND SERVANT, 18.
In foreclosure of mechanics' lien, see MECHANICS' LIENS, 4.
Special findings by jury, see TRIAL, 6-8.
By court in civil actions, see TRIAL, 9.

FIRES:

Negligent setting of fire from locomotive, see RAILROADS, 7, 8.

FISH:

1. FISH—OYSTER BEDS—DEEDS—REVERSION—CONVEYANCE BY STATE. Where, under Rem. & Bal. Code, §§ 6806, 6807, state oyster lands are deeded for the purposes of oyster culture, with reversion to the state in case the lands are not used for that purpose, the state reserving the right to repurchase on paying for improvements, the state cannot convey the fee and reversion to a third person. *Scott v. Olympia Oyster Co*..... 364

2. FISH—OYSTER BEDS—EJECTMENT — TITLE OF PLAINTIFF — FRAUD. One who fraudulently obtained the fee to state oyster lands by false representations that they were not oyster lands, knowing that a conditional fee had been granted for the purposes of oyster culture, cannot maintain ejectment against parties in possession under the oyster land deed. *Scott v. Olympia Oyster Co*..... 364

FLOODS:

Diversion of flood waters, see WATERS AND WATER COURSES, 1.

FORECLOSURE:

Issuance of writ of assistance against receiver in bankruptcy upon sale on foreclosure of mortgage, see ASSISTANCE, WRIT OF.
Statutes relating to mortgage foreclosure sales as impairing obligation of contracts, see CONSTITUTIONAL LAW, 2.
Of lien, see MECHANICS' LIENS.
Of mortgage, see MORTGAGES, 3, 4.
Enforcement of pledge, see PLEDGES.

FORGERY:

Opinion evidence as to forgery, see EVIDENCE, 3, 4.

FORMER ADJUDICATION:

See INDEMNITY; JUDGMENT, 4, 5.

FRAUD:

See SALES, 1, 2.
Of attorney in dealings with client, see ATTORNEY AND CLIENT.
In purchase of corporate stock, see CORPORATIONS, 1.
In obtaining fee to oyster lands, see FISH, 2.

FRAUD—CONTINUED.

In earning of newspaper advertising reward, see REWARD.
Sales of realty, see VENDOR AND PURCHASER, 1, 6.

1. FRAUD—FALSE REPRESENTATIONS—RECORDS OF DISTANT STATE. In a trade of property, a party may rely on and recover damages for false representations that a mortgage included in the trade was a first lien on certain real estate in a distant state, without consulting the public records in such state. *Wilson v. Clark*..... 136

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—DEBTS OF ANOTHER—ORIGINAL PROMISE. An agreement by the president of a society to pay all the costs and expenses of the defense of a suit to reinstate a member is an original promise, and not within the statute of frauds, where the society refused to defend and regarded it as a personal controversy between the plaintiff and the defendant. *Mazzini Society v. Corgiat* 273

2. FRAUDS, STATUTE OF—CONTRACT FOR BROKER'S COMMISSIONS. A broker's contract for the sale of real estate rests in parol, and is void within the statute of frauds, Rem. & Bal. Code, § 5289, requiring an agreement employing an agent to sell real estate for compensation or a commission to be in writing, where it appears that the vendor refused to sign a proposed contract giving the brokers the exclusive right to sell the land and retain all received over $12,000 as commissions, but later wrote that she objected to some parts of the contract, which she said no doubt could be fixed by a satisfactory talk, that they could send down their man and if they sold she wanted $12,000 net, and that they could keep the letter as a contract until they came down; although she afterwards consummated a deal with a purchaser procured by the brokers for $15,000; since the latter does not accept the terms of the contract and they cannot therefore be read together as one; and the statute requires that the amount of the compensation be fixed in the writing. *Crouch v. Forbes* 564

FUNDS:

Use of by state, see STATES.

GAMING:

1. GAMING — INFORMATION — SUFFICIENCY. An information charging merely the opening and conducting of a gambling game without alleging that it was done in any of the capacities prohibited by Rem. & Bal. Code, § 2469, is insufficient to sustain a conviction of a felony under that section, or of a misdemeanor under Rem. & Bal. Code, § 2470, prohibiting betting or wagering on a game carried on in violation of § 2469. *State v. Hardwick*..... 35

GENERAL APPEARANCE:

See APPEARANCE.

GOOD FAITH:

Of purchaser, see BILLS AND NOTES.

GUARANTY:

See INDEMNITY.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 31-37.
In criminal prosecution, see CRIMINAL LAW, 11, 12.

HEIRS:

See ESCHEAT.

HUSBAND AND WIFE:

See DIVORCE; MARRIAGE.
Domicile of, see DOMICILE.
Probate of estate of deceased spouse, see EXECUTORS AND ADMINISTRATORS, 1-4.
Right to interest on decree of divorce, see INTEREST.

1. HUSBAND AND WIFE—COMMON PROPERTY—INCOME—STATUTES. The common property act of 1871, providing that the income or proceeds of the separate property of both husband and wife accruing during marriage shall be common property, did not impress separate property with a trust in favor of the common use of both, in view of other provisions of the act giving each the sole control, management, and power of disposition of their separate estates; but simply provides that the income thereof, when it comes into existence, shall be common property. *Guye v. Guye*..... 340

2. SAME—STATUTES—CHANGE OF STATUS. The common property act of 1871, having provided that the income of separate property should be common property, the legislature would not have power by a subsequent act to declare income already accrued to be separate property, but it could so provide as to future income. *Guye v. Guye* 340

3. SAME—INCOME OF COMMON PROPERTY—"INTEREST." The provision in the common property act of 1871, relating to both personal and real property, that the rents, profits, "interest" and income of separate property shall be common property, means only that the entire income thereof shall be common property, "interest" not having any further significance. *Guye v. Guye*..... 340

4. HUSBAND AND WIFE — COMMUNITY PROPERTY — ACQUIRED AFTER MARRIAGE—ENHANCEMENT IN VALUE. The natural enhancement in value during marriage of the separate property of the spouses is not property acquired during marriage, within the spirit of the community property statutes, which provides that property acquired before marriage and in certain ways, together with the rents, issues, and profits thereof, shall be the separate property of the spouse acquiring it, and that all other property acquired after marriage shall be community property. *Guye v. Guye*..... 340

HUSBAND AND WIFE—CONTINUED.

5. SAME—PURCHASE BEFORE MARRIAGE. Where the husband purchased land, took possession, made improvements, and paid at least part of the purchase price before marriage, it is his separate property, although he received the deed after marriage, in the absence of a showing that community funds entered into the purchase. *Guye v. Guye* 340

6. SAME—TAXES ON SEPARATE PROPERTY—PRESUMPTIONS. Where the husband has separate income, it cannot be presumed that the taxes on his separate property during marriage were paid with community funds. *Guye v. Guye*..... 340

7. SAME—CONTINUANCE OF STATUS—PRESUMPTIONS. It will be presumed that property once shown to be separate property continued to be such until the contrary is made to appear. *Guye v. Guye*.. 340

8. SAME—EVIDENCE—WIFE JOINING IN MORTGAGE. The joinder of a husband and wife in a mortgage of real estate is not evidence that the property was community property. *Guye v. Guye*..... 340

9. SAME—COAL LAND ENTRIES. Lands acquired under coal land entries by a husband are his separate property, in view of the act providing that each spouse may make an entry and acquire title, that the entryman must swear that the entry is made for his own benefit and not directly or indirectly for the benefit of any other person, and requiring no residence on the land. *Guye v. Guye*..... 340

10. SAME—MINING CLAIMS. Mining claims acquired by a husband are his separate property, in view of the act permitting either spouse to make entry and acquire full title from the United States without the aid or intervention of the other. *Guye v. Guye*..... 340

11. HUSBAND AND WIFE—COMMUNITY PROPERTY — EVIDENCE — SUFFICIENCY. Lots purchased by a husband with money received from his father, as an advance from his father's estate, are his separate property, even if he procured a loan to pay a very small portion of the purchase price, where such portion was too small to notice. *Worthington v. Crapser*..... 380

12. SAME—EVIDENCE—ADMISSIONS. The husband's petition for letters testamentary on the estate of his wife is not an admission that certain lots which she attempted to dispose of by her will were community property, where she had other property, and the lots in fact belonged to his separate estate. *Worthington v. Crapser*..... 380

13. HUSBAND AND WIFE—MARRIAGE—COMMUNITY PROPERTY—PRESUMPTIONS—BURDEN OF PROOF. Where parties cohabited as husband and wife, without any marriage, there can be no community property or presumptions attending the marriage state; and the burden of proof is upon the one claiming an interest in property the title to which is vested in the other. *Sloan v. West*..... 623

IDENTITY:

Evidence to identify accused, see CRIMINAL LAW, 2.
Of photograph as duplicate of exhibit, see EVIDENCE, 1.

IMPROVEMENTS:

Local improvements by county, see COUNTIES.
Public improvements, see MUNICIPAL CORPORATIONS, 2-8.
Power of officers to agree to pay cost of street improvement, see SCHOOLS AND SCHOOL DISTRICTS.

1. IMPROVEMENTS—ACTION TO RECOVER LAND—COUNTERCLAIM FOR BETTERMENTS—STATUTES—RELIEF. Under the betterment act, Rem. & Bal. Code, § 797, providing that, in an action for the recovery of real property from one holding in good faith under color or claim of title, the value of permanent improvements and the amount of taxes paid must be allowed as a counterclaim to the defendant, one having in good faith acquired record title and entered into peaceable possession and commenced the erection of a building is entitled to a counterclaim for the taxes paid and the value of the building by him erected pending a suit to quiet title brought by one who had acquired actual title by adverse possession under a mistake as to the true boundary; and no damages having been shown, the decree should secure payment of the same, or, in default thereof, make the parties tenants in common according to their proportionate interests. *Johnson v. Ingram*..... 554

INCOME:

Of separate property, see HUSBAND AND WIFE, 1-3.

INDEMNITY:

1. INDEMNITY—PLEADING—DEFENSE OF FORMER JUDGMENT—NOTICE—FAILURE TO TAKE ADVANTAGE OF. Where a judgment for personal injuries had been recovered against a city, on account of a defect in a street at a railroad crossing, to be kept in repair by the railroad company, and the city in a subsequent suit sought to recover over therefor from the railroad company, the company's answer, which pleaded a judgment in a former action exonerating it from negligence, with due notice thereof to the city, and request to plead the same as a defense, and that the city wilfully and negligently failed to avail itself of the defense, does not in effect charge a fraudulent or collusive failure to interpose the former judgment as an estoppel, but properly pleads that the city, with notice of the judgment as a valid defense, failed to plead it. *Seattle v. Northern Pac. R. Co.* 129

2. SAME—NOTICE OF DEFENSE—CONCLUSIVENESS OF FORMER JUDGMENT—PERSONS CONCLUDED—PARTICIPATING IN TRIAL. In such a case, the fact that the railroad company's attorney was present in court at the trial and had opportunity to examine the pleadings, and furnished the city with the names of witnesses, does not affect the force

INDEMNITY—CONTINUED.

of the former judgment exonerating the company from liability. *Seattle v. Northern Pac. R. Co*..... 129

INDEPENDENT CONTRACTORS:

Agent for insured as, see INSURANCE.

INDIANS:

Evidence of marriage between Indian woman and white man, see MARRIAGE.

INDICTMENT AND INFORMATION:

See LARCENY; PERJURY.
Conducting gambling game, see GAMING.
Criminal complaint for libel, see LIBEL AND SLANDER, 1, 2.

INDORSEMENT:

Of check and delivery to bank for collection, see BANKS AND BANKING, 1, 2.

INFANTS:

See PARENT AND CHILD.
Employment of under age limit, see MASTER AND SERVANT, 1.

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INFRINGEMENT:

Of trade-mark, see TRADE-MARKS AND TRADE-NAMES.

INJUNCTION:

To restrain equal stockholders from securing accounting in action between, see CORPORATIONS, 2.

INSOLVENCY:

Of decedent, see EXECUTORS AND ADMINISTRATORS, 5.

INSPECTION:

Duty to consult records of foreign state, see FRAUD.
By purchaser to discover defects in article, see SALES, 8, 9.

INSTRUCTIONS:

Review as dependent on exceptions in lower court, see APPEAL AND ERROR, 4.
Review as dependent on presentation in record, see APPEAL AND ERROR, 10, 13.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 32, 33.
In criminal prosecutions, see CRIMINAL LAW, 8, 9, 14.
In civil actions, see TRIAL, 4, 5.

INSURANCE:

Mandamus to compel designation of newspaper for publication of insurance reports, see MANDAMUS.

Designation by insurance commissioner of newspaper for publication of reports, see NEWSPAPERS.

Parties defendant in action on contract of insurance made by agent of owner, see PARTIES.

1. INSURANCE—AGENT FOR INSURED—EXISTENCE OF RELATION — INDEPENDENT CONTRACTOR. Where a construction company acted as the agent of the owner for a commission, the owner furnishing the labor and material for the construction of a plant, the owner is liable for the premium on accident insurance taken out in the name of the construction company by authority of the owner, and the construction company is not an independent contractor. *Pennsylvania Casualty Co. v. Washington Portland Cement Co*..... 689

INTENT:

As affecting adverse holding of land, see ADVERSE POSSESSION, 1.

To dedicate property as part of streets, see DEDICATION.

INTEREST:

See USURY.

On amount due in action for price of goods, see SALES, 11.

On taxes, see TAXATION, 8.

Recovery by vendee in action for fraud, see VENDOR AND PURCHASER, 6.

1. INTEREST—JUDGMENTS—DECREE OF DIVORCE. A decree of divorce, directing the husband to pay the wife a stated sum as her proportionate part of the community property and attorney's fees, is a judgment, within Rem. & Bal. Code, § 457, which draws interest from date, the code procedure recognizing no distinctions between judgments and decrees. *Smith v. Smith*..... 288

IRRIGATION:

Furnishing water for, see WATERS AND WATER COURSES, 2-6.

JOINDER:

Of causes of action, see ACTION.

Of parties and causes in action by parent for malpractice in treatment of minor son, see PARENT AND CHILD.

JOINT DEBTORS:

Form of judgment in action against for rent, see JUDGMENT, 1.

JOINT TENANCY:

Action against executors of deceased joint tenant for rent, see EXECUTORS AND ADMINISTRATORS, 5.

Form of judgment against in action for rent, see JUDGMENT, 1.

JUDGES:

Certifying to statement of facts, see APPEAL AND ERROR, 18.
Misconduct as error, see APPEAL AND ERROR, 30.

JUDGMENT:

Review, see APPEAL AND ERROR.
Decision as law of case on second appeal, see APPEAL AND ERROR, 38, 39.
Sufficiency of recital of facts in summary judgment for contempt, see CONTEMPT, 2-4.
Decisions of courts in general, see COURTS.
Conclusiveness of former judgment exonerating railroad from liability for negligence, see INDEMNITY.
Interest on, see INTEREST.
For double rent in action for unlawful detainer, see LANDLORD AND TENANT, 11.
Assessment of benefits to land for local improvement, see MUNICIPAL CORPORATIONS, 4-8.
For enforcement of trust, see TRUSTS.

1. JUDGMENT — FORM — JOINT DEBTORS — PARTY NOT SERVED. Error cannot be urged in that a judgment for rent in an action against joint tenants was not entered against one of the joint debtors, nor against the defendants jointly indebted as far as it may be enforced against the joint property of all, as provided by Rem. & Bal. Code, § 236, where such joint debtor was not served and did not appear, the lease recited that he was a nonresident, and there was no evidence that the defendants had any joint property in this state. *Brownfield v. Holland*..... 86

2. JUDGMENT—RECITALS—JURISDICTION—PROCESS. Recitals in a judgment of due service by publication, "after filing of an affidavit for publication by the attorney for the plaintiff," are not sufficient to overcome jurisdictional defects appearing on the face of the affidavit for publication, where there was a subsequent affidavit of the plaintiff's attorney affirmatively pointing out the defect and making it appear that there was no other affidavit in the record to confer jurisdiction. *Lutkens v. Young*..... 452

3. SAME—PRESUMPTION OF JURISDICTION. The presumption of due service of process from recitals in the judgment is only *prima facie* and may be overcome by an affirmative showing. *Lutkens v. Young* 452

4. JUDGMENT—CONCLUSIVENESS—ISSUES—EXTRINSIC EVIDENCE—SCOPE —IDENTITY OF ISSUES. Where there was a verdict and judgment for a railroad company exonerating it from negligence for a defect in a street which it had agreed to keep in repair, saving the city harmless, and in a subsequent suit against the city for the same injury, the company gave the city due notice of the former judgment, but

JUDGMENT—CONTINUED.

the city failed to avail itself of the defense, suffering judgment for damages, in an action by the city to recover over from the company, the first judgment exonerating the company from negligence is conclusive and binding on the city; and the instructions to the jury in that case are not competent to prove that the scope of the judgment was not a dismissal on the merits; since extrinsic evidence is inadmissible to prove a state of facts at variance with the judgment. *Seattle v. Northern Pac. R. Co*..... 129

5. JUDGMENT — RES JUDICATA — EMINENT DOMAIN. A judgment in condemnation proceedings that a tenant was not entitled to compensation because of a stipulation in the lease agreeing to vacate within thirty days if the land was condemned, is conclusive on the tenant, in the absence of an appeal. *Olson Land Co. v. Alki Park Co.* 521

JURISDICTION:

See PROHIBITION.
By publication of process, see ATTACHMENT.
Particular courts, see COURTS.
To enforce payment of alimony, see DIVORCE, 5.
Decedents' estates, see EXECUTORS AND ADMINISTRATORS, 1-3.
Recitals in judgment as to due service by publication, see JUDGMENT, 2.
Assessment of benefits for improvement, see MUNICIPAL CORPORATIONS, 4-8.
Sufficiency of service by publication to confer jurisdiction, see PROCESS.
Place of trial, see VENUE.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 8, 9, 14.
Questions for jury in civil actions, see TRIAL, 1, 3.
Instructions in civil actions, see TRIAL, 4, 5.
Verdict in civil actions, see TRIAL, 6-8.

KNOWLEDGE:

As affecting assumption of risks by servant, see MASTER AND SERVANT, 11, 12.
Accused's knowledge of falsity of testimony, see PERJURY, 2.

LACHES:

In suit to cancel foreclosure sale, see MORTGAGES, 4.
As bar to action for accounting between partners, see PARTNERSHIP, 2-4.

LAKES:

Grant to Federal government of right to lower waters of lake for ship canal, see NAVIGABLE WATERS.

LANDLORD AND TENANT:

Waiver by appearance of defect in summons in unlawful detainer, see APPEARANCE.

Condemnation of leasehold, see EMINENT DOMAIN, 5-9.

Parol evidence to vary lease, see EVIDENCE, 2.

Action for rent against executor of deceased joint tenant, see EXECUTORS AND ADMINISTRATORS, 5.

Form of judgment in action against joint tenants for rent, see JUDGMENT, 1.

Conclusiveness of judgment denying compensation to tenant in condemnation proceedings, see JUDGMENT, 5.

1. LANDLORD AND TENANT — LEASE — CONSTRUCTION —"PENALTY." A sum equal to two months' rent, paid in advance and declared by a lease to be in consideration of the execution of the lease, which provided that such payment should be credited on the last two months' rent, otherwise to belong to the lessor, is not a penalty, and cannot be offset by the lessee against rent due, upon abandonment of the premises while in arrears. *Dutton v. Christie*..... 372

2. LANDLORD AND TENANT—EVICTION—EMINENT DOMAIN. There is no eviction by a taking of part of the leased premises under the power of eminent domain, as the tenant must seek his damages in the condemnation proceedings; and it is immaterial that the lease provided that in case the premises were condemned the lessee should vacate within thirty days. *Olson Land Co. v. Alki Park Co.* 521

3. LANDLORD AND TENANT—LIABILITY FOR RENT—LEASE—VALIDITY—TERMINATION —BURDEN OF PROOF. Where the pleadings admit that the lessees went into possession under a lease with rent payable monthly, and commenced to pay rent, the burden is upon them to show a termination of the lease prior to the purported term, and they are liable for the rent during the period of their occupancy, as tenants from month to month, regardless of whether the lease was acknowledged or whether it was signed by the wives of the lessors. *Brownfield v. Holland*..... 86

4. LANDLORD AND TENANT—RENT—PERSONS ENTITLED. A transfer of the reversion of leased premises does not carry the right to accrued rents, where they are not mentioned in the deed. *Kneeland Inv. Co. v. Aldrich*..... 609

5. LANDLORD AND TENANT—RECOVERY OF POSSESSION—FAILURE TO PAY TAXES—UNLAWFUL DETAINER. The failure of a lessee to pay taxes, as agreed in the lease, entitles the lessor to maintain unlawful detainer. *Olson Land Co. v. Alki Park Co*..... 521

6. LANDLORD AND TENANT—NOTICE TO QUIT—SUFFICIENCY. A notice to quit for default in the payment of rent is sufficient without a computation of the rent, where it designates the months for which rent is due. *Olson Land Co. v. Alki Park Co*..... 521

LANDLORD AND TENANT—CONTINUED.

7. LANDLORD AND TENANT—UNLAWFUL DETAINER—SERVICE OF NOTICE—PROOF—TRIAL—RECEPTION OF EVIDENCE. Judgment for plaintiff in an action for unlawful detainer will not be reversed on the ground that proof of service of the notice was not made and the notice itself not received in evidence, where the case was reopened to supply the proof and plaintiff testified to making the service, and the notice itself was on file; and a ruling that affidavit of service was not necessary in view of plaintiff's testimony and the return of the service of notice, shows that the notice on file was not intended to be excluded. *O'Connell v. Arai*..... 280

8. LANDLORD AND TENANT—LEASE—RENT—TIME FOR PAYMENT—ESTOPPEL—UNLAWFUL DETAINER. Where a lease for one year at a monthly rental "payable monthly in advance," was executed on the 11th of the month and possession taken on the 15th and rent was paid for the last half of the first month, and thereafter was demanded and paid in advance on the first day of each calendar month for several months without question, the lease will be construed as calling for payments on the first of each calendar month, and the lessee is estopped to assert that notice in unlawful detainer on the 7th, not objected to at the time, was premature; especially where at the trial no issue as to the time of payment or sufficiency of notice was raised by the pleadings, evidence, or requests for findings. *Kneeland Inv. Co. v. Aldrich*..... 609

9. LANDLORD AND TENANT—UNLAWFUL DETAINER—RENT—DEFAULT—EXCUSE FOR NONPAYMENT. Where a lease of a hotel provided for the retention of specified rooms until vacated by the present occupant, in which event the lessee was to be given possession of the rooms, upon surrendering to the lessor certain other rooms in lieu thereof, the lessee must demand possession and offer to surrender the other rooms in exchange in order to evade eviction for nonpayment of rent; and a mere inquiry of a clerk of the lessor as to when possession would be given is not a sufficient demand. *Kneeland Inv. Co. v. Aldrich*..... 609

10. LANDLORD AND TENANT—LEASE—STIPULATED DAMAGES—UNLAWFUL DETAINER. A clause in a lease providing for an initial deposit as stipulated damages in case the lessee does not faithfully pay the rent and perform all the covenants and conditions of the lease, refers only to a violation of the contract, and does not relate to the penalty for unlawful detainer, fixed by Rem. & Bal. Code, § 827, at double the amount of rent due. *O'Connell v. Arai*..... 280

11. LANDLORD AND TENANT—UNLAWFUL DETAINER—JUDGMENT—DOUBLE RENT. In unlawful detainer, Rem. & Bal. Code, § 827, expressly requires judgment for double the amount of rent due, where no damages are claimed. *O'Connell v. Arai*..... 280

LANDLORD AND TENANT:

Waiver by appearance of defect in summons in unlawful detainer, see APPEARANCE.

Condemnation of leasehold, see EMINENT DOMAIN, 5-9.

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1. LANDLORD AND TENANT — LEASE — CONSTRUCTION —"PENALTY." A sum equal to two months' rent, paid in advance and declared by a lease to be in consideration of the execution of the lease, which provided that such payment should be credited on the last two months' rent, otherwise to belong to the lessor, is not a penalty, and cannot be offset by the lessee against rent due, upon abandonment of the premises while in arrears. *Dutton v. Christie*..... 372

2. LANDLORD AND TENANT—EVICTION—EMINENT DOMAIN. There is no eviction by a taking of part of the leased premises under the power of eminent domain, as the tenant must seek his damages in the condemnation proceedings; and it is immaterial that the lease provided that in case the premises were condemned the lessee should vacate within thirty days. *Olson Land Co. v. Alki Park Co.* 521

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LANDLORD AND TENANT—CONTINUED.

7. LANDLORD AND TENANT—UNLAWFUL DETAINER—SERVICE OF NOTICE—PROOF—TRIAL—RECEPTION OF EVIDENCE. Judgment for plaintiff in an action for unlawful detainer will not be reversed on the ground that proof of service of the notice was not made and the notice itself not received in evidence, where the case was reopened to supply the proof and plaintiff testified to making the service, and the notice itself was on file; and a ruling that affidavit of service was not necessary in view of plaintiff's testimony and the return of the service of notice, shows that the notice on file was not intended to be excluded. *O'Connell v. Arai*..... 280

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LARCENY:

1. LARCENY—EVIDENCE—RES GESTAE. In a prosecution for grand larceny of money grabbed from a table during a card game, evidence as to the dealing of the cards preceding the larceny is competent upon the general issue of guilt and also as part of the *res gestae*, notwithstanding it tended to show a conspiracy between the accused and others to rob the prosecuting witness. *State v. Hatch* 617

2. LARCENY—ISSUES AND PROOF—VARIANCE—PROOF OF ROBBERY. In a prosecution for larceny, it is not a variance to prove a robbery, since larceny is included in the offense of robbery, and it is no defense that the offense proved is greater than the one charged. *State v. Hatch* 617

LAW OF THE CASE:

See APPEAL AND ERROR, 38, 39.
Instructions in prosecution for perjury, see CRIMINAL LAW, 9.

LEASES:

See LANDLORD AND TENANT.
Condemnation of leasehold, see EMINENT DOMAIN, 5-9.

LEVY:

Of taxes, see TAXATION.

LIBEL AND SLANDER:

Demurrer to complaint for criminal libel, see CRIMINAL LAW, 3.

1. LIBEL AND SLANDER—CRIMINAL COMPLAINT—DEMURRER — CONCLUSIONS. Upon demurrer to a complaint for criminal libel, the court must determine from the facts alleged whether the publication tended to expose the complainant to hatred, contempt or obloquy, or to injure him in his business, within Rem. & Bal. Code, § 2424, regardless of the conclusions of the pleader in that regard. *State v. Darwin* 303

2. SAME—SUFFICIENCY—PUBLICATION—LIBELOUS PER SE—TRUTH. A complaint alleging the malicious publication in defendant's newspaper of a list of conditional sales made by a furniture dealer to various patrons, as shown by memoranda legally filed by him in the auditor's office two years previously, the truth of which was unquestioned, contains no words libelous *per se*, and does not charge criminal libel when it fails to state facts showing that it tended to expose him to hatred, contempt, or obloquy, or injure him in his business, within Rem. & Bal. Code, § 2424, defining criminal libel; and the conclusions of the pleader to that effect must be disregarded. *State v. Darwin* 303

LIBEL AND SLANDER—CONTINUED.

3. LIBEL AND SLANDER—DAMAGES—EXCESSIVE VERDICT. A verdict for $3,000 for slander in charging a woman with incest will not be set aside as excessive, where there was nothing to indicate passion or prejudice on the part of the jury. *Warren v. Kearney*..... 369

LICENSES:

Licensing practice of medicine as within powers of state, see CONSTITUTIONAL LAW, 1.
Payment of by corporation as condition precedent to action, see CORPORATIONS, 10.
Absence of as affecting validity of marriage, see MARRIAGE, 1.
Grant to Federal government to lower waters of lake for ship canal, see NAVIGABLE WATERS, 1-3.
To practice medicine, see PHYSICIANS AND SURGEONS.
Validity of act prohibiting practice of medicine without license, see STATUTES, 1.

LIENS:

See MECHANICS' LIENS.
Mortgage, see MORTGAGES.
Pledge, see PLEDGES.
For taxes paid, see TAXATION, 7.
Lis pendens notice as lien, see VENDOR AND PURCHASER, 2.

LIMITATION OF ACTIONS:

Laches as bar to action for accounting, see PARTNERSHIP, 4.

1. LIMITATION OF ACTIONS — REAL PROPERTY — ADVERSE POSSESSION. One claiming land by adverse possession, inclosed and held by him under a mistake as to the true boundary line of lots purchased by him, cannot invoke the seven-year statute of limitations for the recovery of land held under color of title; since the paper title is in the true owner, and the ten-year statute applies. *Johnson v. Ingram* 554

LIQUIDATED DAMAGES:

See DAMAGES, 1, 2.

LIS PENDENS:

As lien on property entitling purchaser to rescind, see VENDOR AND PURCHASER, 2.

1. LIS PENDENS—NOTICE—COMMENCEMENT OF ACTION. A *lis pendens* to be effective must be filed in compliance with Rem. & Bal. Code, § 243, requiring that the complaint be filed at or before the filing of the notice. *Burwell v. Smith*..... 1

LIS PENDENS—CONTINUED.

2. LIS PENDENS—NOTICE—PARTIES TO SUIT. Rem. & Bal. Code, § 243, providing that subsequent purchasers shall be bound by notice of *lis pendens*, applies only to purchasers from parties to the action. *Burwell v. Smith* 1

LOANS:

See USURY.

LOCATION:

Of boundary line, see BOUNDARIES.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 2, 3, 11, 15, 18.

MAINTENANCE:

See CHAMPERTY AND MAINTENANCE.

MALICE:

Evidence of, see MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION:

1. MALICIOUS PROSECUTION—MALICE — EVIDENCE — SUFFICIENCY. The evidence is insufficient to support an action for malicious prosecution, where it appears that the defendant, having witnessed an assault and battery by plaintiff upon a third person, stated the facts to the prosecuting attorney and upon his advice swore out a warrant for plaintiff before a justice of the peace; any inference of malice from the fact that the justice discharged the plaintiff, who was manifestly guilty of an assault and battery, being more than overcome in such case. *Fellows v. Beers* 678

MALPRACTICE:

Action by parent for in treatment of minor son, see PARENT AND CHILD.

MANDAMUS:

To compel judge to certify to statement of facts, see APPEAL AND ERROR, 18.

1. MANDAMUS—TO PUBLIC OFFICERS—PARTIES ENTITLED TO MAINTAIN. Where the insurance commissioner is vested with a discretion to designate one newspaper from several of the largest circulation, mandamus does not lie at the suit of the paper having the largest circulation to compel its designation. *State ex rel. Cowles v. Schively* 103

MANDAMUS—CONTINUED.

2. MANDAMUS—PLEADING—CONCLUSION OF PLEADER. In mandamus to compel the designation of a certain newspaper for the publication of annual insurance reports, the allegation that the insurance commissioner wrongfully and unlawfully designated a certain paper for the publication amounts to no more than the conclusion of the pleader from the facts alleged. *State ex rel. Cowles v. Schively*. 103

MARRIAGE:

See HUSBAND AND WIFE.
Establishment of domicile during marriage relation, see DOMICILE.

1. MARRIAGE—EXISTENCE OF RELATION—WANT OF LICENSE—EVIDENCE—SUFFICIENCY. Upon an issue as to the performance of a marriage ceremony, the absence of a license and failure to make any return as required by law are proper facts to be considered, but not conclusive as they do not invalidate a marriage otherwise valid. *Weatherall v. Weatherall*..... 526

2. MARRIAGE—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY. The testimony of an Indian woman that she was married to a white man with whom she had intimate relations is overcome where the preponderance of the evidence is to the effect that no ceremony was performed and that they did not live together as man and wife, the man described himself in many conveyances as a single man; and any presumption from cohabitation is overcome by evidence of the previous bad character of the woman and of similar relations with other men. *Weatherall v. Weatherall*..... 526

3. SAME—WANT OF AUTHORITY. Lack of authority of one officiating as a minister in a marriage ceremony is admissible upon an issue as to whether the authority was exercised. *Weatherall v. Weatherall* 526

MASTER AND SERVANT:

Employment of officers and agents, see CORPORATIONS, 5-9.
Construction company as independent contractor, see INSURANCE.
Liens for labor and materials, see MECHANICS' LIENS.

1. MASTER AND SERVANT—EMPLOYMENT OF CHILD UNDER AGE LIMIT—VIOLATION OF STATUTE — LIABILITY — DEFENSE. One who unlawfully employs a child under the age of fourteen years, prohibited by Rem. & Bal. Code, § 2447, assumes all the risk of personal injuries while he is engaged in the performance of the prohibited duties, regardless of contributory negligence; and in an action by the child, it is no defense that the father of the child misrepresented his age, or that the employer did not "knowingly" violate the statute, and exercised due care to ascertain the age of the child. *Glucina v. Goss Brick Co.* 401

MASTER AND SERVANT—CONTINUED.

2. MASTER AND SERVANT—FACTORY ACT—EFFECT—VIOLATION—NEGLIGENCE. The purpose and effect of the factory act requiring reasonably safe guards for all machinery in a mill which it is practicable to guard, is to make it negligence, as a matter of law, to fail to comply with the requirements of the statute. *Kreymborg v. Thurston* 219

3. MASTER AND SERVANT—NEGLIGENCE—GUARDING MACHINERY—QUESTION OF LAW. Where the uncontradicted evidence shows that an accident could not have happened if a saw had been properly guarded, and that a reasonably safe guard would not have interfered with its efficient operation, the master is chargeable with negligence as a matter of law. *Young v. Aloha Lumber Co*..... 600

4. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—FALL OF TIMBER—CAUSE OF DEATH—EVIDENCE—SUFFICIENCY. In an action for the death of an employee, struck by the fall of a timber from the third floor of a building under construction, a nonsuit is properly granted where there was no evidence, directly or indirectly, as to the cause of the fall of the timber, or that it was negligently piled, and nothing to show that the place was not a reasonably safe place to work, except the accident itself. *Lewinn v. Murphy*..... 356

5. SAME—SAFE PLACE—INCOMPLETED STRUCTURES. The doctrine of safe place does not apply to the construction of buildings, where the situation is constantly changing, with the same force that it does to completed structures and fixed places. *Lewinn v. Murphy*... 356

6. MASTER AND SERVANT—COAL MINES—SAFE PLACE—VENTILATION—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that the owner of a mine failed to perform the imperative and continuing duty to cause air to circulate in the working places in a coal mine, imposed by Rem. & Bal. Code, § 7381, where there was black damp in plaintiff's working place, the foreman instructed him to continue working there and said the falling of the rock would bring ventilation, and the plaintiff testified he would have broken through the wall to good air in about an hour and a half. *Nalewaja v. Northwestern Improvement Co*..... 391

7. SAME—INJURY FROM FALLING ROCK—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. There was sufficient evidence that the presence of black damp in a coal mine was the proximate cause of an injury from falling rock, where the plaintiff's lights were put out by the black damp and he was struck by a rock falling from the face of coal, two to eight feet distant from the place where plaintiff was timbering, and he might have seen the rock and avoided the injury if he had had a light. *Nalewaja v. Northwestern Improvement Co.* 391

8. MASTER AND SERVANT—NEGLIGENCE—PRESUMPTION FROM ACCIDENT—SUFFICIENT NUMBER OF SERVANTS. The fact that a workman was

MASTER AND SERVANT—CONTINUED.

injured while assisting to lower a heavy door, and the accident would not have happened if there had been more men, is not sufficient to establish negligence on the part of the master; since he is only required to exercise ordinary care in furnishing sufficient men for the work. *Rosin v. Danaher Lumber Co*..... 430

9. SAME—INSTRUCTIONS. In an action by a workman injured while assisting to lower a heavy door, through the alleged insufficiency in the number of men handling it, it is error to instruct the jury that the defendant would be liable if he did not furnish sufficient men to handle the door with reasonable safety; since he is not an insurer and need only exercise ordinary care in estimating the number of men required. *Rosin v. Danaher Lumber Co*..... 430

10. MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT. The fact that an injured employee cannot fully explain how an involuntary accident happened does not preclude a recovery. *Young v. Aloha Lumber Co.* 600

11. SAME — GUARDING MACHINERY — ASSUMPTION OF RISKS. An employee does not assume the risks of working on a saw which was not properly guarded, as required by the factory act, from the fact that he was properly instructed. *Young v. Aloha Lumber Co*..... 600

12. MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO WARN—OBVIOUS DANGERS. An experienced logger, 21 years of age, is not entitled to recover for injuries sustained by reason of failure to warn him of the dangers to which he was exposed, and which were so obvious and apparent as to preclude a recovery, where it appears that he was directed to signal a railway train to stop until a cable across the track could be removed, that he stationed himself on a log and on the opposite side of and near the cable when the train was three or four hundred yards away approaching at 35 miles an hour, and remained there until the engine was only two lengths away, and then ran back and was struck by the cable, when he had ample time to place himself in a safe place, there being abundant safe places from which the signal could be given. *O'Dell v. Northern Coast Timber Co*..... 546

13. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—RES IPSA LOQUITUR. The doctrine of *res ipsa loquitur* does not apply where a vat for rendering tallow exploded and injured an employee after it had been successfully and continuously used for two and a half years, where the injured servant had complete charge and control of all the appliances and the cause of the explosion could not be ascertained; since the circumstances do not raise a presumption of negligence against the master where he is not in control. *Lynch v. Ninemire Packing Co*..... 423

14. SAME—RES IPSA LOQUITUR. The doctrine of *res ipsa loquitur* is not applicable to an injury to an employee from the falling of a

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piece of loose timber in an incompleted building with practically open spaces between the different floors. *Lewinn v. Murphy*... 356

15. MASTER AND SERVANT—NEGLIGENCE—GUARDING MACHINERY — CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In an action by an inexperienced man, whose hand was cut while doing his first work on a ripsaw, the negligence of the master and the contributory negligence of the servant is for the jury, and it is error to grant a nonsuit, where it appears that, while the plaintiff was pushing a board through the saw with a stick as directed, the foreman withdrew his attention by suddenly touching him on the shoulder and directing him to work faster, whereupon his hand was cut by the saw in an unexplained manner, there being evidence by an expert that the guard on the saw was only sufficient to protect against spalts or flying pieces, and that it was practicable to guard the saw with an adjustable hood which would have made the accident impossible. *Young v. Aloha Lumber Co*..... 600

16. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a coal miner was guilty of contributory negligence in timbering or failing to timber his working place is for the jury, where it appears that he was timbering when his lights went out and he was struck by a rock falling from the side, he would have finished the timbering within thirty minutes if he had not been injured, and according to one witness the timbering was two or four or six feet from the face of the coal, defendant's witness claiming it should be kept within two and one-half or three feet. *Nalewaja v. Northwestern Improvement Co.* 391

17. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence or recklessness of a green hand in a shingle mill is for the jury, where he stepped into a conveyor to tramp down waste, as he had seen his instructor do a few hours before, and was thrown down upon a saw by reason of lugs in the bottom of the conveyor of which he had no notice, under circumstances raising a strong inference that he was expected to attend to the conveyor, although not directed in words to do so. *Kreymborg v. Thurston*..... 219

18. MASTER AND SERVANT—TRIAL—VERDICT—SPECIAL FINDINGS — CONTRIBUTORY NEGLIGENCE. In an action for personal injuries, a special verdict finding that plaintiff's act of stepping into a conveyor near a cut-off saw was very dangerous from the fact that the cut-off saw was not properly guarded, and that the method employed was safe provided the cut-off saw had been properly guarded, does not show contributory negligence and is not inconsistent with a general verdict for the plaintiff, in the absence of any finding that the danger was known to the plaintiff or so obvious and apparent that a person of ordinary prudence would not have attempted the act. *Kreymborg v. Thurston* 219

MASTER AND SERVANT—CONTINUED.

19. MASTER AND SERVANT—INJURY TO THIRD PERSONS—ACTS WITHIN SCOPE OF EMPLOYMENT. Where the owner of an uncompleted office building employed an elevator boy to run an elevator for the use of tenants while the contractors were installing other elevators and completing the building, the elevator boy's promise to an employee of the contractor not to run the elevator below the second story while the workman was necessarily in the shaft is within the scope of his employment, and does not render him the servant of the promisee; and the owner is liable for his negligence in so doing. *Beatty v. Metropolitan Building Co*..... 207

20. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. Whether a chauffeur was acting within the scope of his authority, so as to render his employer liable for an accident, is a question of fact for the jury, where it appears that the automobile was kept standing for hire in front of a hotel, that the chauffeur took a telephone girl home from her work at the hotel, without collecting any fare, which the owner had permitted on at least one other occasion, that the chauffeur injured a pedestrian on his return trip, and that the chauffeur was not discharged; and it is not sufficient to overcome the *prima facie* case, as a matter of law, although he and the owner testified that he acted contrary to instructions in taking the girl home without collecting a fare. *Kneff v. Sanford*..... 503

21. MASTER AND SERVANT—INJURY TO THIRD PERSONS—TORTS OF SERVANT—SCOPE OF EMPLOYMENT. An employee in a billiard room is not acting within the scope of his employment, and his masters are not liable for his acts, where he made an assault upon a customer for personal reasons and ill will, the customer having been given permission to play by the proprietors, and no duty devolving upon the employee as such to which the assault in any manner related. *Linck v. Matheson*..... 593

MATERIALS:

Liens for, see MECHANICS' LIENS.

Furnished city for public improvement, see MUNICIPAL CORPORATIONS, 2.

MEASURE OF DAMAGES:

See DAMAGES, 3, 4.

MECHANICS' LIENS:

1. MECHANICS' LIENS—RELEASE—CONSIDERATION—EFFECT. A release given by a lien claimant without consideration to enable the owners to transfer property is void as between the parties. *Seattle Lumber Co. v. Cutler*..... 662

2. MECHANICS' LIENS—ENFORCEMENT—RELEASE—ESTOPPEL. The giving of a release from all liability for labor performed or materials

MECHANICS' LIENS—CONTINUED.

furnished, for the expressed purpose of enabling the owner to transfer property which was subject to a mechanics' lien, does not estop the lien claimant from asserting the lien against the purchasers of the property, where the purchasers did not rely upon or know of the release and the same was given without consideration. *Seattle Lumber Co. v. Cutler*..... 662

3. MECHANICS' LIENS—NOTICE OF CLAIM—TIME FOR FILING—"CESSATION"—REPLACING DEFECTIVE MATERIAL. The date of "cessation of the furnishing" of material for a building, within Rem. & Bal. Code, § 1134, requiring claims to be filed within 90 days therefrom, is the date on which the materialman on demand of the owner replaced defective material rejected by the architect, where the materialman acted in good faith and not for the purpose of prolonging the time. *Rieflin v. Grafton*..... 387

4. SAME—FORECLOSURE — FINDINGS — CONCLUSIONS OF LAW. Where the architect rejected material and the owner demanded that the materialman replace it, which was done, a finding that it was "not done in performance of the original contract," is an unwarranted conclusion of law. *Rieflin v. Grafton*..... 387

5. SAME—DUPLICATE STATEMENTS TO OWNER. Rem. & Bal. Code, § 1133, requiring a materialman to deliver to the owner a duplicate statement of the supplies delivered to any person or contractor for the construction of a building, does not apply to materials delivered to the owner. *Rieflin v. Grafton*..... 387

6. SAME—FORECLOSURE—DEFENSES—DAMAGES. Upon the foreclosure of a materialman's lien for materials furnished to and accepted by the contractor, the owner must look to the contractor for any damage resulting from defective material put in the building. *Rieflin v. Grafton*..... 387

MEMORANDA:

Required by the statute of frauds, see FRAUDS, STATUTE OF.

MENTAL CAPACITY:

Of grantor to execute deed, see DEEDS, 2.
To execute will, see WILLS, 2, 3.

MINES AND MINERALS:

Land acquired under mining laws as separate property, see HUSBAND AND WIFE, 9, 10.
Employees in mines, see MASTER AND SERVANT, 6, 16.
Partnership accounting for interest in mining claim, see PARTNERSHIP, 2-4.
Fraud in sale of mining stock, see SALES, 1.

MINORS:

Employment of child under age limit, see MASTER AND SERVANT, 1.
Action by parent for loss of services, see PARENT AND CHILD.

MISCONDUCT:

Of judge ground for reversal, see APPEAL AND ERROR, 30.
Of counsel, see CRIMINAL LAW, 4, 13.
Of witness in criminal prosecution, see CRIMINAL LAW, 5.

MISJOINDER:

Of causes of action, see ACTION.

MISREPRESENTATION:

See FRAUD.
Inducing sale, see SALES, 1, 2; VENDOR AND PURCHASER, 1, 6.

MISTAKE:

Occupancy of land under mistake as to boundary line, see ADVERSE POSSESSION.
Of bank in paying check, see BANKS AND BANKING, 5.
Ground for reformation of instrument, see REFORMATION OF INSTRUMENTS.

MONEY RECEIVED:

Recovery of tax paid, see TAXATION, 7, 8.

MONOPOLIES:

Grants of privileges or immunities, see CONSTITUTIONAL LAW, 3.

MONTH:

Tenancy from month to month, see LANDLORD AND TENANT, 3.

MORTGAGES:

Issuance of writ of assistance in foreclosure proceedings against one in possession as receiver in bankruptcy, see ASSISTANCE, WRIT OF.
Laws relating to foreclosure of as impairing obligation of contract, see CONSTITUTIONAL LAW, 2.
Joinder of wife in as evidence of community nature of property, see HUSBAND AND WIFE, 8.
Prohibiting issuance of writ of assistance after foreclosure, see PROHIBITION.
Effect of mortgage by trustee, see TRUSTS.

1. MORTGAGES — RELEASE — EFFECT OF PARTIAL RELEASE — WATER RIGHTS. Where an irrigation company gave a blanket mortgage on certain lands and all of its water rights and privileges, the release of certain lots not covered by the mortgage has the effect of discharg-

MORTGAGES—CONTINUED.

ing from the lien of the mortgage the water rights that go with the lots, there having been no need of releasing the lots except in so far as lots carried with it the title to the water rights. *Skoog v. Columbia Canal Co*..... 115

2. MORTGAGES—LANDS CONVEYED—EXCEPTIONS. A mortgage upon the lands and water rights of an irrigation company "excepting therefrom such rights as have heretofore been sold or contracted to be sold" by the company is not a lien upon lots and water rights contracted for several months before the execution of the mortgage. *Skoog v. Columbia Canal Co*..... 115

3. MORTGAGES—FORECLOSURE—SALES—IRREGULARITIES—CONFIRMATION. Failure to publish notice of a mortgage foreclosure sale in the exact manner required by law is an irregularity only, and does not render the sale so far void that it is not curable by the order of confirmation. *Strand v. Griffith*..... 334

4. MORTGAGES—FORECLOSURE—SALE—ACTION TO SET ASIDE—LACHES. A delay of nine years in bringing suit to cancel a mortgage foreclosure sale, without any excuse, is such laches as to justify the denial of relief on any ground other than the actual invalidity of the sale. *Strand v. Griffith*..... 334

MOTIONS:

Dismissal of appeal, see APPEAL AND ERROR, 20.
New trial in criminal prosecutions, see CRIMINAL LAW, 10.
New trial in civil actions, see NEW TRIAL.
Dismissal or nonsuit on trial, see TRIAL, 1, 2.

MUNICIPAL CORPORATIONS:

Review of dismissal of police officer by civil service commission, see CERTIORARI.
Dedication of streets to public use, see DEDICATION.
Condemnation of part of university grounds for use as street, see EMINENT DOMAIN, 1-3.
Failure to plead former judgment in favor of railway company as defense in action to recover over for judgment against city for defect in street, see INDEMNITY.
Power of school district officers to agree to pay cost of street improvement, see SCHOOLS AND SCHOOL DISTRICTS.
Street railroads, see STREET RAILROADS.

1. MUNICIPAL CORPORATIONS — POLICE OFFICER—REMOVAL — GROUNDS. A sergeant of police, assigned to duty as a captain of a temporary force, resumes his former relation to the regular force upon the expiration of the temporary office of captain, and his refusal to report for duty as a sergeant warrants his dismissal for insubordination. *King v. Listman*..... 271

MUNICIPAL CORPORATIONS—CONTINUED.

2. MUNICIPAL CORPORATIONS—IMPROVEMENTS — MATERIALS FURNISHED —ACTIONS—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that lumber was used in the construction of a plank road for a city, where it appears that it was ordered for that express purpose, that it was carried to the city by the contractor, and that the lumber actually used was of the same character; especially in the absence of any evidence that it was not the same lumber. *American Mill Co. v. Montesano*..... 683

3. MUNICIPAL CORPORATIONS—IMPROVEMENTS—INJURY TO PROPERTY—DEFECTIVE PLANS. Where property was damaged by the collapse of a fill because of defective plans, the city cannot evade liability by the fact that the work was done by independent contractors. *Potter v. Spokane* 267

4. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — AUTHORITY—PROPERTY DAMAGED—JUDGMENT — JURISDICTION — PRESUMPTIONS. Under Laws 1905, p. 92, § 22, prohibiting the assessment for benefits of lands found by the jury or the court to be damaged, a judgment, on a verdict awarding damages, adjudicating that the land is also liable to assessment, while outside of the ordinary issues provided by statute or settled by the verdict, is not necessarily void for want of jurisdiction appearing on its face, since such adjudication may have been submitted on stipulation or consent, and it is *prima facie* valid as a judgment of a court of general jurisdiction, although it did not recite the jurisdictional facts authorizing the assessment. *Michaelson v. Seattle*..... 230

5. SAME—ASSESSMENTS—JUDGMENT—VACATION — WANT OF JURISDICTION—EVIDENCE—ADMISSIBILITY. An action by property owners to cancel an assessment for benefits upon lots which the jury had found to be damaged, in violation of the statutory prohibition, and to vacate that portion of the decree entered on the verdict which adjudicated that the lots were also liable to assessment, on the ground that the same was outside the issues and beyond the jurisdiction of the court, is a direct attack upon the decree; and the plaintiffs are entitled to overcome the presumption of jurisdiction by evidence that such adjudication was not upon any issue involved in the case, that they never had any notice of any such issue, by pleading, or stipulation, or any notice of such portion of the judgment, which would accordingly be void for want of jurisdiction. *Michaelson v. Seattle*..... 230

6. SAME—ESTOPPEL TO ATTACK JUDGMENT—ACCEPTANCE OF BENEFITS —NOTICE. Where a judgment on a verdict awarding damages to lands in a condemnation case also adjudicated that the lands were liable to assessment for benefits, contrary to the prohibition of the statute and without any jurisdiction therefor, the property owners are not estopped to attack the assessment and such adjudication by

MUNICIPAL CORPORATIONS—CONTINUED.

reason of their acceptance of the award of damages and satisfaction of the judgment on the execution docket, in ignorance of the invalid portion of the judgment decreeing that the lands were subject to assessment. *Michaelson v. Seattle*..... 230

7. MUNICIPAL CORPORATIONS — ASSESSMENTS — OBJECTIONS — WAIVER. A petition of property owners for a street improvement agreeing to pay the cost of the improvement irrespective of any award of damages, waives their right to object to the assessment of their land on the ground that the jury found the same to be damaged, and is *prima facie* sufficient to confer jurisdiction on the court to make the assessment irrespective of the award. *Seattle School District v. Seattle* 245

8. SAME—ABROGATION OF WAIVER—DECREE—VACATION. Where property owners, in their petition, waived their right to object to the assessment of land which the jury found to be damaged, they may, in a direct attack to vacate the judgment for want of jurisdiction, show that the waiver was abrogated, that the court had no jurisdiction to make the assessment, and it is error to exclude evidence thereof. *Seattle School District v. Seattle*..... 245

9. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—ACTIONS —OWNERSHIP OF WAGON. In an action for injuries sustained in a collision with an express wagon, there is sufficient evidence that the wagon belonged to the defendant, where it appears that the wagon bore defendant's name, no one else operated wagons with that name, and the driver was identified as one of defendant's drivers. *Gielens v. Fidelity Transfer & Storage Co*..... 383

10. SAME—NEGLIGENT DRIVING AT CROSSING. It is negligence to drive an express wagon rapidly over a slippery street with a load of gas pipes protruding from the back of the wagon, and turn so abruptly at a crossing as to cause the back part of the wagon to slide towards a pedestrian and strike her with the pipes. *Gielens v. Fidelity Transfer & Storage Co*..... 383

11. MUNICIPAL CORPORATIONS—USE OF STREETS — NEGLIGENCE — VIOLATION OF STATUTE—COLLISION OF AUTOMOBILE. The driving of an automobile on a dark night, on the left-hand side of a city street at a crossing, without having sufficient lights, in violation of the state law and city ordinances, is gross negligence. *Ballard v. Collins*. 493

12. SAME. The driving of an insufficiently lighted automobile at night, on the left-hand side of a narrow street, in violation of law, in order to avoid a street car that was discharging passengers on the right-hand street car track, is not justified as an act in a sudden emergency, where there was not room for two automobiles to pass and the driver might have waited for the street car to proceed. *Ballard v. Collins*..... 493

MUNICIPAL CORPORATIONS—CONTINUED.

13. SAME—CONTRIBUTORY NEGLIGENCE. Contributory negligence by the driver of an automobile which collided with another, is not shown, where he was on the right side of the street, with lawful lights, sounded his horn at the turn, and there was evidence that he was going only two or three miles an hour, while the other car was violating the law as to lights, signals, and the side of the street upon which it could lawfully travel. *Ballard v. Collins*..... 493

14. SAME—CONTRIBUTORY NEGLIGENCE. It is not contributory negligence for a pedestrian to wait at a crossing for the passing of a rapidly approaching express wagon, at a place that would be out of danger if the wagon were normally loaded, without any notice or reason to anticipate danger from gas pipes protruding 8 or 10 feet from the back of the wagon. *Gielens v. Fidelity Transfer & Storage Co.* 383

MUTUALITY:

Of water contract, see WATERS AND WATER COURSES, 6.

NAMES:

See TRADE-MARKS AND TRADE-NAMES.

NAVIGABLE WATERS:

Surface and irrigation waters, see WATERS AND WATER COURSES.

1. NAVIGABLE WATERS—STATE GRANTS—LICENSE OR EASEMENT. An act of the state legislature in aid of a ship canal, granting to the United States the right to lower the waters of a navigable lake, is the grant of an easement, rather than a mere revocable license. *Bilger v. State*..... 457

2. SAME—LICENSES—REVOCATION. A license by the state to the United States to lower the waters of a lake, in aid of the construction of a canal, is one coupled with an interest, and not revocable, where the United States made and expended appropriations for the work on the faith thereof. *Bilger v. State*..... 457

3. NAVIGABLE WATERS—RIGHTS OF ABUTTERS—LOWERING WATERS—AUTHORITY. Where the Federal government has been granted authority to lower the waters of a lake by a canal, abutters on the lake cannot object that the work is being done by the state and county, where the state and county are doing the work on behalf of the Federal government, to whom it will belong when completed. *Bilger v. State*..... 457

4. NAVIGABLE WATERS — RIPARIAN AND LITTORAL RIGHTS. Under Const., art 17, § 1, wherein the state asserts the ownership of the bed and shores of all navigable waters in the state to high water mark, the owner of upland under patents from the Federal government has no riparian or littoral rights as against the state, which

NAVIGABLE WATERS—CONTINUED.

holds the title of the beds and shores in fee, free from incumbrances or easements of any kind. *Bilger v State*..... 457

5. NAVIGABLE WATERS—SHORES AND BEDS—TITLE—CONVEYANCE FROM STATE. Abutting upland owners on a navigable lake, who purchased the shore lands from the state after the state had granted to the United States the right to lower the waters of the lake, take subject to such right. *Bilger v. State*..... 457

NAVIGATION:

See NAVIGABLE WATERS.

NECESSITY:

For separate bond by parties joining in appeal, see APPEAL AND ERROR, 5.

Sale of assets of corporation in action between equal stockholders to settle rights, see CORPORATIONS, 3.

For filing petition for probate of will, see WILLS, 5.

NEGLIGENCE:

Of bank in failing to collect check, see BANKS AND BANKING, 3, 4.

Instructions as to negligence in carriage of passenger, see CARRIERS.

In allowing fall of electric wire, see ELECTRICITY, 4.

Of employers, see MASTER AND SERVANT.

Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 15-18.

In use of city streets, see MUNICIPAL CORPORATIONS, 9-12.

Of person injured on street, see MUNICIPAL CORPORATIONS, 13, 14.

In making flying switch, see RAILROADS, 5, 6.

Of person injured by operation of railroad, see RAILROADS, 6.

Fire from defective or negligently operated locomotive, see RAILROADS, 7, 8.

Collision between automobile and street car, see STREET RAILROADS.

Loss of goods, see WAREHOUSEMEN.

1. NEGLIGENCE—DANGEROUS PREMISES—DEGREE OF CARE—CUSTOMARY METHODS. It is not negligence for a dealer in carpets to display the same in a well-lighted room upon a smooth hard wood floor, or to leave a small carpet upon the floor for a time after it had fulfilled its use in the display, where that was the usual custom of ordinarily prudent carpet dealers; and accordingly it is not liable for injuries sustained by a customer in slipping and falling on the floor or the small carpet, no negligence being shown. *Chilberg v. Standard Furniture Co.*..... 414

2. NEGLIGENCE — DANGEROUS PREMISES — CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show negligence in the maintenance of a stairway in a store, and does not show contributory negligence, where it appears that the stairway

NEGLIGENCE—CONTINUED.

was not lighted and was obscured by tables and wares and was not visible to one approaching it until arrival upon it, that the aisle going by it at right angles was crowded with shoppers, and a customer, jostled by the crowd and going straight ahead past the stairway without being able to see it, fell down the stairs when she stepped aside in meeting a person going in the opposite direction. *Emmons v. Charlton & Co.*..... 276

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

Opinion evidence as to forging of note and mortgage, see EVIDENCE, 3, 4.

Pledge of as collateral security, see PLEDGES.

NEWSPAPERS:

Libel, see LIBEL AND SLANDER.

Mandamus to compel designation for publication of insurance reports, see MANDAMUS.

Action by one claiming newspaper advertising reward, see REWARDS.

1. NEWSPAPERS—"OF LARGEST CIRCULATION"—DESIGNATION FOR PUBLICATION—DISCRETION OF OFFICER—ABUSE—INSURANCE. Rem. & Bal. Code, § 9037, which provides that the insurance commissioner shall designate two daily papers "of the largest general circulation" for the publication of the annual insurance reports, and that he shall have the right to make a personal examination to determine "which are the two papers of such largest circulation," merely requires him to designate two papers from the class of papers having the largest circulation, and vests a discretion in him to designate any two papers belonging to that class, although the difference in their circulation may be considerable, which discretion will not be controlled by the courts except for abuse. *State ex rel. Cowles v. Schively*. 103

2. SAME—DESIGNATION OF NEWSPAPERS—ABUSE OF DISCRETION. Under Rem. & Bal. Code, § 9037, vesting in the insurance commissioner a discretion to designate a newspaper in Eastern Washington from the class of papers having the largest general circulation for the publication of the annual insurance reports, the commissioner's act in designating a paper having a circulation of from 6,000 to 9,000 when another paper had five times that circulation, is not so arbitrary and capricious as to call for interference by the courts. *State ex rel. Cowles v. Schively*..... 103

NEW TRIAL:

Review of orders on appeal, see APPEAL AND ERROR, 26.

In criminal prosecutions, see CRIMINAL LAW, 10.

1. NEW TRIAL — GROUNDS — TIME FOR MOTION — EXTENSION — "GOOD CAUSE." The trial court having inherent power to grant a new trial

NEW TRIAL—CONTINUED.

where the evidence is insufficient to sustain the verdict, it will be assumed therefrom that "good cause" was shown for extending the time within which to make a motion therefor. *Sylvester v. Olson* 285

NONSUIT:

On trial, see TRIAL, 1, 2.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

See LIS PENDENS.
Of appeal, see APPEAL AND ERROR, 6-9.
Levy of attachment, see ATTACHMENT.
To depositor of failing condition of bank, see BANKS AND BANKING, 3.
Of former judgment as defense, failure to plead, see INDEMNITY.
To quit, see LANDLORD AND TENANT, 6, 7.
Of liens, time for filing, see MECHANICS' LIENS, 3.
Of foreclosure sale, failure to publish, see MORTGAGES, 3.
Of action, see PROCESS.
Lis pendens notice as lien entitling purchaser to rescind, see VENDOR AND PURCHASER, 2.
Of intention to rescind, see VENDOR AND PURCHASER, 3, 4.

NOVATION:

1. NOVATION—LIABILITY OF NEW DEBTOR—DEFENSES. Where the debt of a corporation was discharged in consideration of assigned accounts and certain promissory notes executed by the president of the corporation, there is a complete novation, which is not affected by an accompanying agreement to employ the maker of the notes as a salesman, where it was expressly provided that the employment could be discontinued without affecting liability on the notes. *Brinker v. Oldham & Sons* 620

OATH:

Failure of witness to take oath as harmless error, see CRIMINAL LAW, 12.

OBJECTIONS:

At trial of criminal prosecution, see CRIMINAL LAW, 5.
To assessment for public improvements, see MUNICIPAL CORPORATIONS, 4-8.

OBLIGATION OF CONTRACT:

Laws impairing, see CONSTITUTIONAL LAW, 2.

OBSTRUCTIONS:

Diverting flood waters, see WATERS AND WATER COURSES, 1.

OFFICERS:

Review of dismissal of police officer by civil service commission, see CERTIORARI.
Corporate officers, see CORPORATIONS, 5-9.
County officers, see COUNTIES.
Mandamus affecting, see MANDAMUS.
Municipal officers, removal of, see MUNICIPAL CORPORATIONS, 1.
Discretion of insurance commissioner to designate newspapers for publication of insurance reports, see NEWSPAPERS.
School officers, directors, powers, see SCHOOLS AND SCHOOL DISTRICTS.
Executive construction of statutes, see STATUTES, 2.

OPINION EVIDENCE:

In criminal prosecutions, see CRIMINAL LAW, 2.
In civil actions, see EVIDENCE, 3, 4.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORDERS:

Review, see APPEAL AND ERROR.
Of tax commission raising valuation of railway property, see TAXATION, 1, 3, 6.

ORIGINAL PROMISE:

To pay debt of another, see FRAUDS, STATUTE OF, 2.

OWNERSHIP:

Of wagon colliding with pedestrian in city street, see MUNICIPAL CORPORATIONS, 9.

OYSTERS:

Conveyance by state of oyster lands for purpose of oyster culture, see FISH.

PARENT AND CHILD:

1. PARENT AND CHILD—INJURIES—MALPRACTICE—ACTION BY PARENT—LOSS OF SERVICES—EXPENSE. A parent may maintain an action for malpractice in treating his minor son, whereby he incurred expense for treatment and suffered loss of services. *Otey v. Bradley*... 500

2. PARENT AND CHILD—INJURIES—ACTIONS—JOINDER—PARTIES. There is no defect of parties plaintiff or misjoinder of causes, in an action brought for malpractice in the treatment of plaintiff's minor son without joining the son, where the plaintiff states but one good cause of action in his favor for expenses incurred and loss of service, although other allegations show that the son also has a cause of action, he being a stranger to the suit. *Otey v. Bradley*..... 500

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

To show conditional indorsement and delivery of check to bank, see BANKS AND BANKING, 2.
In civil actions, see EVIDENCE, 2.
To show scope of former judgment, see JUDGMENT, 4.

PARTIES:

See ASSISTANCE, WRIT OF; ATTACHMENT; JUDGMENT, 1; USURY.
Suit against as affecting joinder of causes of action, see ACTION, 2.
Right to appeal, see APPEAL AND ERROR, 1.
On whom notice of appeal must be served, see APPEAL AND ERROR, 7, 8.
Rights and liabilities as to costs, see COSTS.
Proceedings to enforce decree for alimony, see DIVORCE, 4.
Action against executors of deceased joint tenant, see EXECUTORS AND ADMINISTRATORS, 5.
Concluded by judgment, see INDEMNITY.
Entitled to rent, see LANDLORD AND TENANT, 4.
Affected by notice of *lis pendens*, see LIS PENDENS, 2.
Right to writ of mandate, see MANDAMUS, 1.
Persons entitled to mechanics' lien, see MECHANICS' LIENS, 2.
Action by parent for malpractice in treatment of minor son, see PARENT AND CHILD.
Entitled in equity to complain of misappropriation of public funds by state officers, see STATES, 3.

1. PARTIES—DEFECT OF PARTIES DEFENDANT—PRINCIPAL AND AGENT—ELECTION. There is no defect of parties defendant from the fact that, in an action on a contract of insurance made by a building agent for the owner, an undisclosed principal, the creditor elected to hold the principal only and discharged the agent. *Pennsylvania Casualty Co. v. Washington Portland Cement Co*..... 689

PARTNERSHIP:

Liability of partner for deficiency after discharge of associate, see ASSIGNMENT FOR CREDITORS.
Service of notice by publication in action against, see ATTACHMENT.
Use of trade-name, see TRADE-MARKS AND TRADE-NAMES.

1. PARTNERSHIP—HOLDING OUT AS PARTNER—EVIDENCE—SUFFICIENCY. Findings to the effect that defendant was liable for the debt of a co-partnership are sustained, where it appears that he was at one time a member of the firm, invested money therein, and held himself out as such to the plaintiff, that no formal dissolution was an-

PARTNERSHIP—CONTINUED.

nounced, and that, three years after he claims to have retired from the firm, he signed a writing agreeing to give his services to the firm for one year or employ a man to take his place, and signed the firm name to a note in payment of firm obligations, and indorsed another note for a partnership debt. *National Grocery Co. v. Simmons* 264

2. PARTNERSHIP—ACCOUNTING—PARTNERSHIP PROPERTY — EVIDENCE — SUFFICIENCY—LACHES. In an action for a partnership accounting, an indefinite agreement for partnership relations respecting the operation of a boat to be owned equally by the parties, the hull of which was furnished by plaintiff and the engines and principal part of the expenses by the defendant, is not sufficient to create a partnership in two other boats, thereafter acquired by the defendant, in which the engines of the old boat were installed, where it appears that the partnership operations had been discontinued for a year, the plaintiff taking the hull of the old boat and the defendant the engines, that the defendant used and exercised full control over the new boats, and the plaintiff took the hull of the old one, and later stored and did work for the defendant on the new boats, charging defendant full value for such storage and service, and made no claim to an interest therein for seven years. *McIntyre v. Johnston* 323

3. PARTNERSHIP—ACCOUNTING—CONDITIONAL SALE OF PROPERTY—TITLE —EVIDENCE FOR ACCOUNTING—SUFFICIENCY. A partnership accounting for a half interest in a mining claim, alleged to have been acquired by defendant in a trade for a partnership boat, is properly denied, where it appears that the partnership relations had been discontinued, that the boat and claim were considered only of nominal value, the claim being offered to defendant for $150, and that he agreed to take the boat back and pay $150 in case the vendee could not make it run, which defendant did long before the mining claim was found to be of value; since the boat was only conditionally sold, the title thereto did not pass, and it did not form the consideration for the claim. *McIntyre v. Johnston*..... 323

4. PARTNERSHIP—ACCOUNTING — DEFENSES — LACHES. The lapse of seven years, after the abandonment of a partnership, and the continued exclusive use for that time of some of the property by the partner who had furnished most of the money, may be sufficient to bar an action for an accounting by the other partner. *McIntyre v. Johnston* 323

PART PAYMENT:

As accord and satisfaction, see ACCORD AND SATISFACTION.

PASSENGERS:

See CARRIERS.

PAYMENT:

See ACCORD AND SATISFACTION.
Mistake of bank in paying check, see BANKS AND BANKING, 5.
Of license fee as condition precedent to action by corporation, see CORPORATIONS, 10.
For support of children pending appeal under agreement not to issue execution on judgment, see DIVORCE, 3.
Recovery of taxes paid, see IMPROVEMENTS; TAXATION, 7, 8.
Provision in lease for advance payment or deposit as penalty, see LANDLORD AND TENANT, 1, 10.
Time for payment of rent, see LANDLORD AND TENANT, 8.
Excuse for nonpayment of rent, see LANDLORD AND TENANT, 9.

PENALTIES:

Under contracts, see DAMAGES, 1, 2.
Provisions in lease, see LANDLORD AND TENANT, 1, 10.

PENDENCY OF ACTION:

Effect as to property involved, see LIS PENDENS.

PERFORMANCE:

Rescission by vendee for delay in performance by vendor, see VENDOR AND PURCHASER, 3-5.

PERJURY:

Instructions as law of case, see CRIMINAL LAW, 9.

1. PERJURY—INFORMATION—SUFFICIENCY—CHARGING FALSITY OF TESTIMONY. An information for perjury sufficiently negatives the truth of the false testimony when it sets out the false testimony, and asserts its falsity by negation and by setting out the true facts. *State v. Smails*..... 172

2. SAME—ACCUSED'S KNOWLEDGE OF FALSITY. An information for perjury sufficiently charges the accused's knowledge of the falsity of his testimony where it charges that he wilfully, knowingly, and falsely testified to a certain state of facts with knowledge of each fact alleged to negative the truth thereof. *State v. Smails*..... 172

3. PERJURY—EVIDENCE—SUFFICIENCY. A conviction of perjury is sustained by the direct testimony of one witness and corroborating circumstances established by independent evidence of such a character as to clearly turn the scale and overcome the oath of the defendant and the legal presumption of innocence. *State v. Smails* 172

PERSONAL INJURIES:

See NEGLIGENCE.
To passenger, see CARRIERS.
Excessive damages, see DAMAGES, 4.
Recovery over by city of judgment against for defects in street, see INDEMNITY.
To employee, see MASTER AND SERVANT.
To traveler on city street, see MUNICIPAL CORPORATIONS, 9-14.
Action by parent for malpractice in treating son, see PARENT AND CHILD.
To person on or near railroad tracks, see RAILROADS, 5, 6.
Findings as to damages in action for, as within issues and proof, see TRIAL, 9.

PETITION:

Of owners agreeing to pay costs of improvement as waiver of objections to assessment, see MUNICIPAL CORPORATIONS, 7.
In probate proceedings, see WILLS, 5.

PHOTOGRAPHS:

Newspaper photograph as evidence, see EVIDENCE, 1.

PHYSICIANS AND SURGEONS:

Regulation of practice of medicine as invasion of civil rights, see CONSTITUTIONAL LAW, 1.
Action by parent for malpractice in treatment of minor son, see PARENT AND CHILD.
Act prohibiting practice of medicine without license as embracing more than one subject, see STATUTES, 1.

1. PHYSICIANS AND SURGEONS — PRACTICING WITHOUT LICENSE — OFFENSES—COMPLAINT—SUFFICIENCY. A complaint for practicing medicine without a license is sufficient where the acts constituting the offense are set forth in ordinary concise language without repetition in such manner as to enable a person of common understanding to know what was intended. *State v. Greiner* 46

2. PHYSICIANS AND SURGEONS—PRACTICING MEDICINE—TREATMENT — EVIDENCE—SUFFICIENCY. Under the statute prohibiting any mode of treating the sick without first obtaining a license, a conviction is sustained where it appears that the defendant diagnosed the patient's ailments with the aid of a vibrator, used manual manipulations, prescribed a dietary, gave advice, and collected a fee. *State v. Greiner* 46

PLANS:

Defects in causing injury to property, see MUNICIPAL CORPORATIONS, 3.

PLEADING:

See EJECTMENT; LIBEL AND SLANDER, 1, 2.
Amendment on appeal, see APPEAL AND ERROR, 25.
Review of errors in as dependent on prejudicial nature of same, see APPEAL AND ERROR, 37.
Amendment of in action by bailor for loss of goods, see BAILMENT.
In action to quiet title, see CHARITIES, 3.
In criminal prosecutions, see CRIMINAL LAW, 3.
In action against executor of deceased joint tenant for rent, see EXECUTORS AND ADMINISTRATORS, 5.
Criminal information or complaint, see GAMING.
In action to recover over against railroad company for defect in street, see INDEMNITY.
Variance between issues and proof in criminal prosecution, see LARCENY, 2.
In mandamus proceeding, see MANDAMUS.
Practicing medicine without license, see PHYSICIANS AND SURGEONS.
Complaint in action to reform deed, see REFORMATION OF INSTRUMENTS.
Complaint for rescission of contract for breach of warranty, see SALES, 8.
Findings of court as within issues and proof, see TRIAL, 9.

1. PLEADING — COMPLAINT — DEMURRER. A complaint stating any cause of action is not demurrable for want of sufficient facts because it attempts to state another cause of action which plaintiff is not entitled to maintain. *Otey v. Bradley*..... 500

2. PLEADING—COMPLAINT—DEMURRER. A complaint for the breach of a written contract of employment at a specified sum per month is not subject to a general demurrer for want of sufficient facts to state a cause of action, from the fact that it also alleges a contemporaneous oral agreement to advance expense money, evidence as to which might have been inadmissible as varying the terms of the writing. *Rehlow v. Schmitt*..... 666

3. PLEADING—REPLY—DEPARTURE—QUIETING TITLE. In an action to quiet title, in which the complaint alleged that defendant claims some interest adverse to the plaintiffs, which was without right, and the defendant answered claiming title under a deed from the plaintiffs, it is a fatal departure, authorizing judgment for the defendant on the pleadings, for the plaintiffs to reply that the deed, executed in blank, was fraudulently procured by one B. and wrongfully delivered to defendant as security for a loan to B. for not more than $650, and that if defendant had any interest at all, it was only as a mortgagee. *Clemmons v. McGeer*..... 446

4. PLEADING—DEMURRER—CONCLUSIONS—CONTRACTS — CONSIDERATION. In pleading a written contract which speaks for itself as to the consideration, an allegation that it was without consideration is noth-

PLEADING—CONTINUED.

ing more than the pleader's conclusion, and without avail on demurrer. *Brinker v. Oldham & Sons*..... 620

PLEDGES:

1. PLEDGES—NOTE AS COLLATERAL—RIGHT OF PLEDGEE—CORPORATIONS—STOCKHOLDERS—SURETIES ON PRINCIPAL NOTE. Where a stockholder's notes for his stock subscription were negotiated by the corporation as collateral security for its own note, which was indorsed by other stockholders who had paid their stock subscription, the holder in due course of the principal and collateral notes may enforce the collateral, although it was fraudulently obtained, without first proceeding to collect the principal note, where the corporation had gone into the hands of a receiver and was not shown to be solvent, and the indorsers financially responsible on the principal note were only sureties for the corporation. *Scandinavian American Bank v. Appleton*..... 203

POLICE:

Removal of police officer, see MUNICIPAL CORPORATIONS, 1.

POLICY:

Liability of owner for premium on accident insurance taken out by agent in name of construction company, see INSURANCE.

POOLING AGREEMENT:

For voting of corporate stock, see CORPORATIONS, 6.

POSSESSION:

Character of to establish title, see ADVERSE POSSESSION.
Pleading possession in ejectment, see EJECTMENT.
Recovery of possession of leased premises, see LANDLORD AND TENANT, 5-11.

POWERS:

Of county to make local improvement, see COUNTIES.
Of courts, see COURTS.
Of school district officers, see SCHOOLS AND SCHOOL DISTRICTS.
Of state to aid in Federal enterprise, see STATES.
Of railway and tax commission in valuation of railway property, see TAXATION, 1, 3-6.

PRACTICE:

See APPEAL AND ERROR; APPEARANCE; ASSISTANCE, WRIT OF; ATTACHMENT; CONTEMPT; COSTS; CRIMINAL LAW; DIVORCE; NEW TRIAL; PLEADING; PROHIBITION; TRIAL.
Prosecution of actions in general, see ACTION.
Procedure of particular courts, see COURTS.
Of medicine without license, see PHYSICIANS AND SURGEONS.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 31-37.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 11, 12.

PREMISES:

Maintenance of dangerous premises, see NEGLIGENCE.

PREMIUMS:

For insurance, see INSURANCE.

PRESENTMENT:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 6.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 34.
Dedication of property to public use, see DEDICATION.
Negligence in allowing fall of electric wire, see ELECTRICITY, 4.
As to payment of taxes on separate property with community funds, see HUSBAND AND WIFE, 6.
As to separate nature of property, see HUSBAND AND WIFE, 7.
As to community nature of property, see HUSBAND AND WIFE, 13.
Of due service of process from recitals in judgment, see JUDGMENT, 3.
Of negligence from accident, see MASTER AND SERVANT, 8, 13, 14.
Validity of judgment assessing benefits for improvement, see MUNICIPAL CORPORATIONS, 4.
On appeal from order of tax commission raising value of railway property, see TAXATION, 6.

PRINCIPAL AND AGENT:

See BROKERS.
Corporate officers and agents, see CORPORATIONS, 5-9.
Insurance agents, see INSURANCE, 4.
Election to hold principal on contract of insurance made by agent, see PARTIES.
Suit against as affecting joinder of causes of action, see PARTIES, 2.
Authority of agent, see RAILROADS, 1.

PRIZE:

Newspaper advertising reward, see REWARDS.

PROBATE:

Estates of decedents, see EXECUTORS AND ADMINISTRATORS.
Of will, see WILLS, 5.

PROBATE COURTS:

See COURTS, 2.

PROCESS:

See ATTACHMENT.
On appeal, see APPEAL AND ERROR, 6-9.
Effect of appearance, see APPEARANCE.
Recitals in judgment as to due service by publication, see JUDGMENT, 2.

1. PROCESS—SERVICE BY PUBLICATION—JURISDICTION—AFFIDAVITS. A service by publication without mailing copies to the defendant does not confer jurisdiction unless it is stated in the affidavit for publication that defendant's residence is not known. *Lutkens v. Young*. 452

2. SAME—AMENDMENT OF DEFECTS. The failure of an affidavit for publication to state that the residence of the defendant was not known, where copies were not mailed, being a jurisdictional defect, is not capable of amendment after judgment by the filing of another affidavit. *Lutkens v. Young*..... 452

PROHIBITION:

To prevent ascertainment of amount and enforcing payment of attorney's fees by court upon consent of parties, see COURTS, 3.

1. PROHIBITION—WHEN LIES—ADEQUATE REMEDY BY APPEAL. Prohibition does not lie to prevent the issuance of a writ of assistance, after a mortgage foreclosure, since there is an adequate remedy by appeal. *State ex rel. Biddle v. Superior Court*..... 312

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

See TRADE-MARKS AND TRADE-NAMES.
Adverse possession, see ADVERSE POSSESSION.
Dedication to public use, see DEDICATION.
Taking or damaging for public use, see EMINENT DOMAIN.
Escheat, see ESCHEAT.
Common, community or separate, nature of, see HUSBAND AND WIFE.
Recovery of value of improvements and taxes paid, see IMPROVEMENTS.
Recovery of possession of leased premises, see LANDLORD AND TENANT, 5-11.
Assessment of benefits, see MUNICIPAL CORPORATIONS, 4-8.
Injury to by defect in plans for city work, see MUNICIPAL CORPORATIONS, 3.
Of partnership, see PARTNERSHIP, 2-4.
Held in trust, see TRUSTS.

PROXIMATE CAUSE:

Of injury to servant in coal mine, see MASTER AND SERVANT, 7.

PUBLICATION:

Service of process, see ATTACHMENT.
Recitals in judgment as to due service of process, see JUDGMENT, 2.
Of libel, see LIBEL AND SLANDER.
Mandamus to compel publication in certain newspaper of annual insurance reports, see MANDAMUS.
Failure to publish notice of foreclosure sale, see MORTGAGES, 3.
Designation of newspapers for publication of insurance reports, see NEWSPAPERS.
Service of process, see PROCESS.

PUBLIC LANDS:

Condemnation of lands devoted to public use, see EMINENT DOMAIN, 2, 3.
Acquisition of as separate property of husband, see HUSBAND AND WIFE, 9, 10.

PUBLIC POLICY:

Validity of agreement to pay expense of defending suit, see CHAMPERTY AND MAINTENANCE.
Validity of pooling contract for voting of corporate stock, see CORPORATIONS, 6.

PUBLIC SCHOOLS:

Power of officers to waive exemption from assessments, see SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

Dedication of property, see DEDICATION.
Taking property for public use, see EMINENT DOMAIN.

QUESTION FOR COURT:

Negligence in allowing fall of electric wire, see ELECTRICITY, 4.

QUESTION FOR JURY:

In action for injury to servant, see MASTER AND SERVANT, 15-17, 20.
Negligence in making flying switch, see RAILROADS, 5.
Fire set by defective or negligently operated locomotive, see RAILROADS, 7.
In civil actions, see TRIAL, 1, 3.

QUIETING TITLE:

Joinder of causes of action, see ACTION, 1.
Counterclaim for betterments, see IMPROVEMENTS.
Departure in pleading, see PLEADING, 3.

RAILROADS:

Carriage of goods and passengers, see CARRIERS.
Appropriation of property, see EMINENT DOMAIN, 5-9.
In city streets, see STREET RAILROADS.
Taxation, see TAXATION, 1, 3-6.

1. RAILROADS—AGENTS—SCOPE OF AUTHORITY. The superintendent of the dining car department of a transcontinental railroad has *prima facie* authority to contract for menu card folders for use in the company's dining cars. *Brace v. Northern Pac. R. Co.*..... 417

2. RAILROADS—RIGHT OF WAY—CONVEYANCE—CONSTRUCTION — STIPULATED DAMAGES. A provision in a right of way deed that the grantee was "not to interfere" with the grantors' use of an intersecting logging road, and should pay $1,000 per day as stipulated damages, "if such interference occurs," has no application to a breach of other provisions requiring the grantee to construct and maintain a crossing, which collapsed and interrupted the use of the logging road for four days, in the absence of evidence that the collapse was the result of the grantee's "interference," where the deed provided for revocation or forfeiture for failure to strictly comply with its terms; since the deed did not clearly express an intention that the damage clause was to apply in case of any breach except an affirmative or physical act of "interference." *Clemons v. Grays Harbor & Puget Sound R. Co.*..... 38

3. RAILROADS — CROSSINGS—CONTRACTS—BREACH. Where a railroad company agreed to construct and maintain a crossing according to specified plans, and after its construction the crossing collapsed, the fact that it was constructed according to the plans does not relieve the company from liability for failure to maintain it. *Clemons v. Grays Harbor & Puget Sound R. Co.*..... 38

4. RAILROADS—CROSSINGS—CONTRACTS—BREACH — NOMINAL DAMAGES. Upon breach of a stipulation by a railroad company to maintain a crossing, which collapsed from an undisclosed cause, the company is liable for nominal damages. *Clemons v. Grays Harbor & Puget Sound R. Co.*..... 38

5. RAILROADS—CROSSINGS—FLYING SWITCH IN CITY — NEGLIGENCE — QUESTION FOR JURY. The negligence of a railway company in making a flying switch, in a city, is a question for the jury, where the switched cars were on a down grade on a spur track running nearly parallel to a sidewalk until it crossed the walk at an angle, there was considerable noise in the vicinity preventing a person from hearing a warning shout, and control of the cars by hand brakes was more than ordinarily difficult. *Williams v. Northern Pac. R. Co.*..... 57

6. SAME—CONTRIBUTORY NEGLIGENCE. A girl, fourteen years of age, who was run down on a city crossing by cars on a spur track, started

RAILROADS—CONTINUED.

down grade on a flying switch, is not guilty of contributory negligence as a matter of law from the fact that she did not look back after she was within ten or twelve feet from the crossing when the cars were sixty feet away approaching from the rear. *Williams v. Northern Pac. R. Co.*..... 57

7. RAILROADS — FIRES — NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Whether a pile of cordwood, 135 feet distant from defendant's railroad tracks, was burned by a fire set by a defective or negligently operated locomotive, is for the jury, where there was evidence that the fire started in the early morning, that no fire was discernible in the vicinity as late as 10 o'clock the evening before, that defendant's locomotive passed at 3:15 in the morning, that sparks of sufficient size frequently escaped from the defendant's engines and were thrown considerable distances, and that fires therefrom were a common occurrence during the dry season; notwithstanding that negligence was rebutted by evidence as to the condition and operation of the engine which presumably caused the fire. *Asplund v. Great Northern R. Co.*..... 164

8. SAME—EVIDENCE OF OTHER FIRES—ADMISSIBILITY. Evidence of other fires set out by other engines at other times is admissible, as tending to show negligence by a fire set by a particular engine; where the emission of sparks and setting of fires was a matter of frequent occurrence. *Asplund v. Great Northern R. Co.*..... 164

RAPE:

1. RAPE—CORROBORATION OF PROSECUTRIX—EVIDENCE—SUFFICIENCY. A conviction of statutory rape is sufficiently sustained by corroboration of the prosecutrix, where her story as to being taken to a lodging house by the defendant as his daughter and occupying the same room, after the landlady had prepared a couch for her, and of stopping at a drug store with him the evening before, and at a restaurant the next morning, is corroborated by witnesses who saw them at the drug store and restaurant, and by the landlady who remembered the occurrence but could not identify the girl nor positively identify the accused. *State v. Morrow*..... 297

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Adverse possession, see ADVERSE POSSESSION.
Boundaries of, see BOUNDARIES.
Dedication to public use, see DEDICATION.
Recovery of, see EJECTMENT.
Taking or damaging for public use, see EMINENT DOMAIN.
Of husband or wife, see HUSBAND AND WIFE.

REAL PROPERTY—CONTINUED.

Recovery of possession of leased premises, see LANDLORD AND TENANT, 5-11.

Recovery by one claiming adverse possession, see LIMITATION OF ACTIONS.

Taxation of, see TAXATION.

Sale of, see VENDOR AND PURCHASER.

RECEIPTS:

Warehouse receipts, see WAREHOUSEMEN.

RECEIVERS:

Appeal by receiver in bankruptcy, see APPEAL AND ERROR, 1.

Issuance of writ of assistance in foreclosure proceedings against one in possession as receiver in bankruptcy, see ASSISTANCE, WRIT OF.

Of corporations in general, see CORPORATIONS, 2, 3.

RECITALS:

In judgment, see JUDGMENT, 2.

RECORDS:

On appeal, see APPEAL AND ERROR, 10-18.

Review of error as depending on presentation of same by record, see CRIMINAL LAW, 13, 14.

Duty to consult records of foreign state, see FRAUD.

REFORMATION OF INSTRUMENTS:

Place of trial, see VENUE.

1. REFORMATION OF INSTRUMENTS — MUTUAL MISTAKE — EVIDENCE — SUFFICIENCY. A mutual mistake, warranting the reformation of a deed, is established, within the rule requiring clear and convincing evidence, where the deed called for the southeast quarter, and was not read by the grantors, who intended to convey the southwest quarter, and it appears that the agreement was for an unimproved quarter, that the southeast quarter was improved and worth twice as much as the southwest quarter, that the grantors had declined to convey the northeast quarter, which was of less value than the southeast, and testified that they had given the grantees the choice of the two west quarters, which were of equal value and unimproved, the grantees admitting that they were to have unimproved land, but testifying that they were given the choice of the two south quarters, and that they were surprised to find improvements on the land described in the deed. *Rosenbaum v. Evans*..... 506

2. REFORMATION OF INSTRUMENTS — COMPLAINT — SUFFICIENCY — MUTUAL MISTAKE. A complaint for the reformation of a deed sufficiently shows a "mutual" mistake, where it alleges a mistake either of the scrivener or of the plaintiffs, whereby the southeast quarter was conveyed, when the grantors and grantees both intended the southwest quarter. *Rosenbaum v. Evans*..... 506

REFORMATION OF INSTRUMENTS—CONTINUED.

3. REFORMATION OF INSTRUMENTS—DEFENSES—ESTOPPEL. Failure to read a deed does not estop the grantors from maintaining an action to reform it to correct a mistake in the description. *Rosenbaum v. Evans*..... 506

REGULATION:

Of irrigation company for supply of water, see WATERS AND WATER COURSES, 2-6.

RELEASE:

See ACCORD AND SATISFACTION.
Of debtor, see ASSIGNMENT FOR CREDITORS.
By claimant of right to lien, see MECHANICS' LIENS, 1, 2.
Of mortgage, see MORTGAGES, 1.

RELIANCE:

Right to rely on false statements, see FRAUD.

RENT:

See LANDLORD AND TENANT, 3, 4, 6, 8-11.
Value of rental in condemnation of leasehold, see EMINENT DOMAIN, 5-9.
Liability of executor of deceased joint tenant for rent, see EXECUTORS AND ADMINISTRATORS, 5.

REPEAL:

Of criminal statutes, see CRIMINAL LAW, 1.

REPLY:

See PLEADING, 3.

REQUEST:

Time for request for instructions, see TRIAL, 5.

RESCISSION:

Of lease, see LANDLORD AND TENANT, 3.
Of contract of sale of goods, see SALES, 2, 9.
Of contract for sale of land, see VENDOR AND PURCHASER, 2-5.

RES GESTAE:

In criminal prosecutions, see LARCENY.

RESIDENCE:

See DOMICILE.
Domicile for purpose of administration, see EXECUTORS AND ADMINISTRATORS, 1, 2.
Of defendant, see PROCESS.

RES IPSA LOQUITUR:

See MASTER AND SERVANT, 13, 14.

RES JUDICATA:

See JUDGMENT, 4, 5.
Decision as law of case on second appeal, see APPEAL AND ERROR, 38, 39.
Conclusiveness of decision as to jurisdiction, see COURTS, 4.
Conclusiveness of former judgment exonerating railway company from liability, see INDEMNITY.

REVENUE:

See TAXATION.

REVERSION:

Of lands conveyed by state for oyster culture, see FISH.

REVIEW:

See APPEAL AND ERROR; CERTIORARI; CRIMINAL LAW, 11-14.
Divorce proceedings, see DIVORCE, 2, 3.
In condemnation proceedings, see EMINENT DOMAIN, 10.
Order of tax commission raising valuation of railway property, see TAXATION, 6.

REVOCATION:

License to Federal government to lower waters of lake for ship canal, see NAVIGABLE WATERS, 1, 2.
Of will, see WILLS, 4.

REWARDS:

1. REWARD—CONDITIONS OF OFFER—DECISION OF DISPUTES—CONCLUSIVENESS. Where a newspaper's advertising reward was offered upon condition that it should be the sole judge of any dispute and that its decision must be accepted as final, an action cannot be maintained by one claiming the reward, where the fact of his earning the reward was disputed, and the paper investigated the claim and rejected it, especially in the absence of fraud. *Davidson v. Times Printing Co.* 577

2. SAME—EARNING OF REWARD—FRAUD. Where a newspaper offered a reward of $500 to the person who would first arrest one whose pictures were published in the paper, the paper to be the sole judge of disputes arising or the interpretation of the rules of the contest, the paper is justified in denying the claim of one who made the arrest through information obtained by collusion with an unfaithful servant of the person sought, on the ground of unfair dealing. *Davidson v. Times Printing Co.* 577

RIGHT OF WAY:

Of railroads, see RAILROADS, 2.

RIPARIAN OWNERS:

Protection against flood waters, see WATERS AND WATER COURSES, 1.
Rights as against state, see NAVIGABLE WATERS, 4, 5.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 11, 12.

ROBBERY:

Proof of in prosecution for larceny, see LARCENY, 2.

1. ROBBERY—EVIDENCE — SUFFICIENCY. A conviction of robbery is sustained by the evidence of the victim that the defendants seized and carried him along the sidewalk, abstracted silver from his trousers' pocket, and threw him down on the walk, and that, when he got up, his pocket book and gold pieces which he was carrying in his inside coat pocket were gone. *State v. Brache*..... 396

2. ROBBERY—ISSUES AND PROOF—VARIANCE. Upon an information, charging robbery of "lawful money of the United States," it is not a fatal variance to prove the taking of $1.75 in silver and a twenty and a five-dollar gold piece, the *prima facie* presumption being that the witness was speaking of current coins of the country, especially where no objection thereto was made below. *State v. Brache*. 396

3. ROBBERY—TRIAL—INSTRUCTIONS. In a trial for robbery, where defendants severed, an instruction that the accused could not be found guilty unless the jury found that he took the money from the prosecuting witness, is more favorable to accused than his requested instructions that he could not be found guilty unless he assisted in taking it or the taking was within the common purpose of the defendants. *State v. Brache*..... 396

RULES OF COURT:

See COURTS, 1.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 4-6,9.

SALES:

Statute relating to mortgage foreclosure sales as impairing obligations of contract, see CONSTITUTIONAL LAW, 2.

Of assets of corporation in action between equal stockholders to settle rights, see CORPORATIONS, 3.

Of corporate stock, see CORPORATIONS, 1, 5, 7.

Electric current, action for price, see ELECTRICITY, 1-3.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

On foreclosure of mortgage, see MORTGAGES, 3, 4.

Conditional sale of partnership property, see PARTNERSHIP, 3.

Of realty, see VENDOR AND PURCHASER.

1. SALES—MINING STOCK—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY. A husband having purchased mining stock for the benefit of himself and wife, they cannot claim that the sale was induced by false representations as to the value and title of the company's "mines," where it appears that he was an officer of the corporation, knew that the title was held by another in trust, had employed a

SALES—CONTINUED.

practical mining man to make a report on the property, and claims to have relied upon a prospectus of the company which showed that the "mines" were only undeveloped mining prospects which were at that time in good faith believed to be valuable. *Cooper v. Fisher* 489

2. SALES—WARRANTY — BREACH — FRAUD. An executed contract of sale may be rescinded for breach of express warranty without proof of fraud on the part of the seller in making the sale. *Klock v. Newbury* 153

3. SALES—RESCISSION—TENDER. Upon rescission of the sale of a motor car, returning it to the garage where the delivery was made, with a written order for it, constitutes a sufficient tender. *Klock v. Newbury* 153

4. SAME. The tender of a motor car, on rescission of the sale, is not objectionable because the car was dismantled, where the seller sanctioned the dismantling in order to repair the car and make it comply with his warranty. *Klock v. Newbury*..... 153

5. SALES—RESCISSION—WAIVER. Repairs on a touring car, which did not materially change its condition, do not waive the purchaser's right to rescind the sale for breach of warranty. *Klock v. Newbury* 153

6. SAME—ESTOPPEL. An offer by the purchaser of a touring car to permit the seller to put the car in order, not accepted by the seller, does not estop the purchaser from rescinding the sale for breach of warranty. *Klock v. Newbury*..... 153

7. SALES—WARRANTY OF QUALITY—WAIVER — RESCISSION — DAMAGES FOR BREACH. Upon a sale of brick for a Federal building, the purchaser waives the right to rescind the sale for defects as to quality by delaying for sixteen months to give the seller any definite information regarding the number of brick rejected by the supervising architect; and in an action for the price can only offset such damages as it has sustained. *Dickinson Fire & Pressed Brick Co. v. Crowe & Co.* 550

8. SAME — RESCISSION BY VENDEE — DILIGENCE — PLEADING. A complaint for a rescission of a contract of sale for breach of warranty is sufficient without stating facts showing the exercise of ordinary care by the plaintiff to discover the defects, where the defects were latent, or it does not appear on the face of the complaint that the defects could have been discovered by the exercise of ordinary care. *Klock v. Newbury*..... 153

9. SALES — WARRANTY — CAVEAT EMPTOR — OPPORTUNITY TO INSPECT. The rule of *caveat emptor* does not apply to the sale of a motor car under an express written warranty that it was in first-class condition, even if the purchaser had an opportunity to inspect it. *Klock v. Newbury*..... 153

SALES—CONTINUED.

10. SALES — ACTION FOR PRICE — COUNTERCLAIM — DAMAGES. Where brick of varying size and color were mixed at the request of the buyer, who knew that they were dirty and needed cleaning, in an action for the price an offset of $100 damages for expense in sorting and cleaning the brick is an ample allowance, there being no definite testimony to show that such expense should not have been anticipated from a mixture of the grades. *Dickinson Fire & Pressed Brick Co. v. Crowe & Co*..... 550

11. SALES — ACTION FOR PRICE — INTEREST — COUNTERCLAIM. Upon a cash sale of brick, an unliquidated counterclaim for damages for breach of warranty as to quality will not prevent the recovery of interest from the time the demand accrued on the balance found due. *Dickinson Fire & Pressed Brick Co. v. Crowe & Co*..... 550

SATISFACTION:

See ACCORD AND SATISFACTION.

SCHOOLS AND SCHOOL DISTRICTS:

Condemnation of state school lands, see EMINENT DOMAIN, 1-3.

1. SCHOOLS AND SCHOOL DISTRICTS — POWERS — OFFICERS — ASSESSMENTS—WAIVER OF EXEMPTIONS. A petition by a school district for the improvement of a street, agreeing to pay its just proportion of the cost of the improvement irrespective of any award of damages, is not *ultra vires*, or beyond the power of the school district officers, although the law exempts from assessment lands found by the jury to be damaged. *Seattle School District v. Seattle*..... 245

SEPARATE ESTATE:

Of husband or wife, see HUSBAND AND WIFE.

SERVICE:

Notice of appeal, see APPEAL AND ERROR, 7-9.
Of statement of facts on adverse party, see APPEAL AND ERROR, 15, 16.
Of affidavit on motion to dismiss appeal, see APPEAL AND ERROR, 20.
Of process, see ATTACHMENT; PROCESS.
Of notice to quit, see LANDLORD AND TENANT, 7.

SET-OFF AND COUNTERCLAIM:

Counterclaim for betterments in action to recover real property, see IMPROVEMENTS.
In action for price of goods sold, see SALES, 7, 10, 11.

SHORE LANDS:

Purchase from state subject to easement in aid of Federal ship canal, see NAVIGABLE WATERS, 5.

SLANDER:

See LIBEL AND SLANDER.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 11-18.
Duplicate statement to owner of material furnished contractor, see MECHANICS' LIENS, 5.

STATES:

Construction of ship canal, see CANALS.
Condemnation of state school lands, see EMINENT DOMAIN, 1-3.
Escheat of property to, see ESCHEAT.
Conveyance of oyster lands for purpose of oyster culture, see FISH.
Grant to government to lower waters of lake as easement, see NAVIGABLE WATERS, 1-3.
Imposition of tax upon county, see TAXATION, 2.

1. STATES—USE OF FUNDS. The state can lend its aid to enterprises undertaken by the Federal government. *Bilger v. State*. 457

2. STATES—USE OF FUNDS. Federal Const., art. 1, § 10, does not restrict the power of the state to aid in enterprises undertaken by the Federal government. *Bilger v. State*..... 457

3. STATES—FUNDS — MISAPPROPRIATION — ACTION — PARTIES. A taxpayer cannot complain in equity of the misappropriation of public funds by state officers, as the attorney general is the proper person to institute such suits. *Bilger v. State*..... 457

STATUTES:

See CONTEMPT; DIVORCE; MASTER AND SERVANT, 1, 2.
Construction of statutes relating to *bona fide* purchaser of notes, see BANKS AND BANKING, 1.
Authorizing construction of ship canal, see CANALS.
Regulation of practice of medicine, see CONSTITUTIONAL LAW, 1.
Laws impairing obligation of contracts, see CONSTITUTIONAL LAW, 2.
Criminal prosecutions, see CRIMINAL LAW, 1.
Act granting authority to assess property for local improvement as exercise of taxing power, see EMINENT DOMAIN, 4.
Statute of frauds, see FRAUDS, STATUTE OF.
Relating to common property, see HUSBAND AND WIFE, 1-3.
Recovery of betterments in action to recover real property, see IMPROVEMENTS.
Of limitation, see LIMITATION OF ACTIONS.
Valuation of railway property for purpose of taxation, see TAXATION, 3-5.

1. STATUTES—TITLE AND SUBJECTS. An act prohibiting the practice of medicine without first obtaining a license, is not objectionable as embracing more than one subject from the fact that it contains pro-

STATUTES—CONTINUED.

visions affecting a variety of practitioners having different systems and methods of treatment. *State v. Greiner*..... 46

2. STATUTES — CONSTRUCTION — EXECUTIVE CONSTRUCTION. The construction of a statute of doubtful meaning, by the highest law officer of the executive department, while not binding on the courts, is entitled to considerable weight. *State ex rel. Cowles v. Schively* 103

STIPULATED DAMAGES:

Provision for in lease, see LANDLORD AND TENANT, 10.

STIPULATIONS:

Jurisdiction to determine amount of attorney's fees upon stipulation to dismiss action, see COURTS, 3.

In railway deed to maintain crossing, see RAILROADS, 2-4.

1. STIPULATIONS—CONSTRUCTION—DISMISSAL OF ACTION — ATTORNEY'S FEES. A stipulation for the dismissal of an action, upon conveyance of part of the property in dispute to trustees, who were to pay to the plaintiff's attorneys, on account of their contingent fees, "whatever attorney's fees are allowed or established in their favor for the party of the second part [plaintiff] in such suit," does not contemplate that the fees are to be established in the pending case, but means that the fees are to be paid when determined in an action brought for that purpose; as it is distinctly provided that the pending suit shall be dismissed. *State ex rel. Bogle v. Superior Court* 96

STOCK:

Corporate stock, see CORPORATIONS.

STOCKHOLDERS:

Of corporations, see CORPORATIONS.

Pledge by corporation of note for stock subscription as collateral security for own note, see PLEDGES.

STORAGE:

See WAREHOUSEMEN.

STREET RAILROADS:

Carriage of passengers, see CARRIERS.

1. STREET RAILROADS—COLLISION WITH AUTOMOBILE—USE OF STREETS —INSTRUCTIONS. In an action for damages to an automobile in a collision with a street car, it is proper to refuse instructions to the effect that the owner of the automobile could not recover if the automobile was being operated on the street car tracks at a time when it was unnecessary to do so and when a car might be expected at any time; since he may lawfully use any part of the street convenient for his use, if not in the immediate use of another. *Pantages v. Seattle Electric Co*..... 159

STREETS:

Dedication to public use, see DEDICATION.
Condemnation of state school land for street, see EMINENT DOMAIN, 1-3.
Negligence in use of, see MUNICIPAL CORPORATIONS, 9-14.
Collision between automobile and street car, see STREET RAILROADS.

SUMMONS:

Waiver of defects in by appearance, see APPEARANCE.

SURFACE WATERS:

See WATERS AND WATER COURSES, 1.

TAXATION:

Levy of assessment on lands benefited by ship canal as exercise of special privilege or immunity, see CONSTITUTIONAL LAW, 3.
Assessment of property benefited by local improvement as exercise of taxing power, see EMINENT DOMAIN, 4.
Presumption of payment with community funds, see HUSBAND AND WIFE, 6.
Recovery of taxes paid, under betterment act, see IMPROVEMENTS.
Failure of lessee to pay taxes as giving right to maintain unlawful detainer, see LANDLORD AND TENANT, 5.

1. TAXATION — UNIFORMITY — UNEQUAL TAXATION. Where railway property is assessed upon a higher standard than other railway property and an unequal burden is placed upon it, the company is denied the guaranties of the constitution, and may object although the property was assessed at less than its actual value. *State ex rel. Oregon R. & Nav. Co. v. Clausen*..... 535

2. TAXATION—IMPOSITION BY STATE. An act authorizing a county to levy a special assessment for benefits accruing from a public improvement is not the imposition of a tax upon the county by the state, prohibited by Const., art. 11, § 10. *Bilger v. State*..... 457

3. TAXATION — VALUATION OF RAILWAYS — POWERS OF COMMISSION — SIMILAR STATUTES—REPUGNANT ACTS. Where the value of railway property has been fixed by the state railway commission pursuant to the act of 1907 (Rem. & Bal. Code, § 8638) passed March 8th and approved March 16, 1907, which provides for a determination of the actual value of all railroads by reference to the actual cost of reproduction and that the findings of the railway commission shall be conclusive in any proceeding in which the public and the railroad is interested, the state tax commission has no power to fix another valuation for the purposes of taxation, under the act of 1907 (Rem. & Bal. Code, § 9141) passed February 20th and approved March 6th, which provides that the state tax commission shall determine the annual assessment of the operating property of all railroads by reference to books, papers, market value of the

TAXATION—CONTINUED.

stock, mileage and gross earnings, and personal view, if necessary; in view of both the object to be accomplished by the railway commission act and the fact that it was passed subsequently to the passage of the other act. *State ex rel. Oregon R. & Nav. Co. v. Clausen* 535

4. SAME—STATUTES — CONSTRUCTION—REPUGNANT ACTS — HARMONIZING ACTS PASSED AT SAME SESSION. The two acts are repugnant, except in so far as the state tax commission may estimate the value until such time as the valuation is fixed by a more certain method by the state railway commission, and this construction should be adopted in order to harmonize two acts passed at the same session; especially in view of the amendatory act of 1911, p. 538, § 117, expressly making the railway commission valuations applicable for the purposes of assessment and taxation. *State ex rel. Oregon R. & Nav. Co. v. Clausen*..... 535

5. SAME—STATUTES—LEGISLATIVE CONSTRUCTION. The courts will not speculate upon legislative intent when that body has subsequently put its own construction on prior enactments. *State ex rel. Oregon R. & Nav. Co. v. Clausen*..... 535

6. SAME—VALUATION BY TAX COMMISSION—REVIEW — RECORD — PRESUMPTIONS. An arbitrary order of the state tax commission raising the valuation of railroad property from $19,500,000 to $27,529,771, cannot be sustained on appeal from the order, when the record on appeal does not show the introduction of any evidence or any inquiry by the commission such as is contemplated by Rem. & Bal. Code, § 9141, authorizing the commission to estimate the value; since no presumptions can be indulged on a direct appeal from the finding. *State ex rel. Oregon R. & Nav. Co. v. Clausen*..... 535

7. TAXATION — PAYMENT — EQUITABLE LIEN FOR PAYMENT. Where taxes are compromised by one claiming ownership of the land of another, his equitable lien therefor is limited to the sum actually paid, and cannot be extended to cover the original tax or services in making the payment. *Vietzen v. Otis*..... 411

8. TAXATION — RECOVERY OF TAXES PAID — INTEREST. Rem. & Bal. Code, § 9233, providing that the occupant or tenant or any other person paying taxes on real estate which ought to have been paid by the owner, lessor or party in interest, may recover the same, with interest at ten per cent, has no application to payments by parties claiming to own the land and making payment for themselves; since the statute was intended to protect parties who pay taxes for the use of other persons, and the rule of *ejusdem generis* applies in the construction of the words "any other person." *Vietzen v. Otis* 411

TAXPAYER:

Right to complain in equity of misappropriation of public funds by state officers, see STATES, 3.

TENANCY IN COMMON:

Creation of relation by decree giving relief under betterment act, see IMPROVEMENTS.

TENDER:

Of article purchased, on rescission of sale, see SALES, 3, 4.
Of deed, see VENDOR AND PURCHASER, 5.

TESTAMENTARY CAPACITY:

See WILLS, 2, 3.

TIME:

For filing proposed statement of facts, see APPEAL AND ERROR, 15.
Service of affidavit on motion to dismiss appeal, see APPEAL AND ERROR, 20.
For objections at trial of criminal prosecution, see CRIMINAL LAW, 5.
Second motion for new trial, see CRIMINAL LAW, 10.
Payment of rent under lease for payments monthly in advance, see LANDLORD AND TENANT, 8.
Filing notice of claim, see MECHANICS' LIENS, 3.
Motion for new trial, extension of time for, see NEW TRIAL.
Request for instruction, see TRIAL, 5.
For performance by vendor, see VENDOR AND PURCHASER, 5.

TITLE:

See ADVERSE POSSESSION; EJECTMENT.
Of check deposited in bank, see BANKS AND BANKING, 1, 2.
Of claim against estate, see EXECUTORS AND ADMINISTRATORS, 6.
Of plaintiff in ejectment, see FISH, 2.
Of state to beds and shores of navigable waters, see NAVIGABLE WATERS, 4, 5.
Statutes, see STATUTES, 1.
Held in trust, see TRUSTS.
Of vendor, effect of *lis pendens*, see VENDOR AND PURCHASER, 2.

TORTS:

See FRAUD; LIBEL AND SLANDER; MALICIOUS PROSECUTION; NEGLIGENCE.
Measure of damages, see DAMAGES.
Injury to third persons, see MASTER AND SERVANT, 19-21.
Of city, see MUNICIPAL CORPORATIONS, 3.

TRADE-MARKS AND TRADE-NAMES:

1. TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT. The prior use of the trade-name "Fremont Undertaker," at Fremont, precludes the adoption by another firm at the same place of the name "Fremont Undertaking Company," where confusion results therefrom. *Rosenburg v. Fremont Undertaking Co*..... 52

TRADE-MARKS AND TRADE-NAMES—CONTINUED.

2. SAME—RIGHT OF ASSIGNEE—CHANGE OF NAME. Successors in interest acquire the right to change the trade-name "Fremont Undertaker" to "Fremont Undertaking Company," as against parties adopting a similar name. *Rosenburg v. Fremont Undertaking Co* 52

3. SAME—ABANDONMENT. The right to the use of a trade-name employed by a firm is abandoned and lost, where, upon dissolution of the copartnership, the member succeeding to the business agreed to, and for a time did, discontinue its use. *Rosenburg v. Fremont Undertaking Co.* 52

TRIAL:

Review of rulings as dependent on presentation of objections or exceptions in lower court, see APPEAL AND ERROR, 2-4.
Review of findings, see APPEAL AND ERROR, 2-4, 27-29.
Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 10, 13, 14.
Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 31-37.
Instructions in actions for injuries to passenger, see CARRIERS.
Of criminal prosecution, see CRIMINAL LAW.
Condemnation proceedings, see EMINENT DOMAIN.
For personal injuries, see MASTER AND SERVANT.
Instructions in action for damages to automobile in collision with street car, see STREET RAILROADS.
Place of trial, see VENUE.

1. TRIAL—PROVINCE OF COURT AND JURY. Where plaintiff's *prima facie* case, sufficient on motion for a nonsuit, is so fully explained and controverted as to leave no substantial conflict, the case should be taken from the jury. *Scarpelli v. Washington Water Power Co.* 18

2. TRIAL—MOTION FOR NONSUIT — HEARSAY — INFERENCES. Upon motion for a nonsuit, the court must consider all justifiable inferences from the evidence that are favorable to the plaintiff. *Young v. Aloha Lumber Co*..... 600

3. TRIAL—QUESTION FOR JURY — CREDIBILITY OF WITNESS. Upon an issue as to whether a contract had been altered after it was signed by defendant's agent, the credibility of the evidence of the agent is for the jury. *Brace v. Northern Pac. R. Co*..... 417

4. TRIAL — INSTRUCTIONS — CURING ERROR BY OTHER INSTRUCTIONS. Where the issue on defendant's negligence was whether he had furnished sufficient men to handle a door, the error in a concrete instruction that he was negligent if he did not furnish sufficient men to handle it with reasonable safety is not cured by a later abstract instruction in the most general terms as to the rule for determining the negligence of either party by reference to the conduct of ordinarily prudent men. *Rosin v. Danaher Lumber Co*..... 430

TRIAL—CONTINUED.

5. TRIAL—INSTRUCTIONS — TIME FOR REQUEST — DISCRETION. Under Rem. & Bal. Code, § 339, providing that the court shall instruct the jury at the conclusion of the evidence, and thereafter counsel may address the jury, it is discretionary for the court to refuse to give a further instruction after argument of the counsel. *State v. Brache* 396

6. TRIAL—SPECIAL VERDICTS—LACK OF EVIDENCE. A special finding that brackets were too light to sustain a wire, when there was no evidence on the subject, is a mere conjecture and not controlling. *Scarpelli v. Washington Water Power Co*..... 18

7. TRIAL—SPECIAL VERDICTS — UNCONTROVERTED EVIDENCE. A special finding by a jury that a wire was not thrown down by a certain accident cannot be sustained where it disregards the uncontradicted evidence in the case. *Scarpelli v. Washington Water Power Co*.... 18

8. TRIAL—FINDINGS—SPECIAL VERDICT—QUESTIONS OF LAW. Where objection to title, evidenced by an abstract, involves only the question of the lien of mortgages, as appears from their face, a question of law is presented, and the advisory verdict of a jury is no proper guide to the decision. *Skoog v. Columbia Canal Co*..... 115

9. TRIAL—FINDINGS—DAMAGES—ISSUES AND PROOF. A finding of six hundred dollars damages to person and property by an automobile collision, without segregation of the items, is within the issues and proof, where the pleadings claimed $500 for personal injuries, and over $220 damages to the car, and $700 damages in the salable value thereof; and there was evidence that the cost of repairing the car was $220, that its market value was reduced $500 after the repairs had been made, and the plaintiff was thrown against the car with great force, and bruised and confined to her bed for three weeks. *Ballard v. Collins*..... 493

TRUSTS:

Charitable trusts, see CHARITIES.

1. TRUSTS—JOINT PURCHASE—TITLE—IN ONE NAME—EQUITY. Where plaintiffs and defendants jointly purchased forty acres of land, the deed being taken in the name of the defendants, and plaintiffs paid for seven acres, set off and agreed upon, the defendants hold the title thereto in trust, and equity will decree a conveyance to plaintiffs; and the rule that the statute of frauds prevents specific performance of oral contracts to convey land does not apply. *Weber v. Whidden* 472

2. SAME—MORTGAGE BY TRUSTEE—EFFECT. The fact that both parties paid but one-half the purchase price, and defendants gave back a mortgage for the balance, does not affect plaintiffs' equitable title, except as an incumbrance to be satisfied by payment of their proportion of the mortgage. *Weber v. Whidden*..... 472

UNDUE INFLUENCE:

Procuring making of will, see WILLS, 1.

UNIFORMITY:

Of taxation, see TAXATION, 1.

UNITED STATES:

Construction of ship canal by Federal government, see CANALS.
Power of state to aid in Federal enterprise, see STATES.

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 5-11.
Waiver of defect in summons by appearance, see APPEARANCE.

USURY:

1. USURY—WHO MAY RAISE OBJECTION. The objection that the giving of stock to persons who advanced money for loans to the corporation amounted to usury cannot be urged by a person who was not interested in the transaction or stock. *Winsor v. Commonwealth Coal Co.* 62

VACATION:

Of deed on ground of mental incapacity of grantor, see DEEDS, 2.
Foreclosure sale, see MORTGAGES, 4.
Judgment decreeing lands damaged as subject to assessment for benefits, see MUNICIPAL CORPORATIONS, 5, 6, 8.

VALUATION:

Of property for purpose of taxation, see TAXATION, 1, 3-6.

VALUE:

Of rental in condemnation of leasehold, see EMINENT DOMAIN, 5-9.
Of railway property for purpose of taxation, see TAXATION, 1, 3-6.

VARIANCE:

In criminal prosecution, see LARCENY, 2.

VENDOR AND PURCHASER:

Liability of grantee for deficiency shown by subsequent overlapping grant from common grantor, see BOUNDARIES, 2.
Fraud in trade of property, see FRAUD.
Contract for sale of land by broker as within statute of frauds, see FRAUDS, STATUTE OF, 2.
Purchasers pending suit, see LIS PENDENS, 2.
Purchase of state shore lands subject to easement in aid of Federal ship canal, see NAVIGABLE WATERS, 5.
Transfer of ownership of personal property, see SALES.
Title to property held in trust upon joint purchase, see TRUSTS.

VENDOR AND PURCHASER—CONTINUED.

1. VENDOR AND PURCHASER—FRAUD—EVIDENCE—SUFFICIENCY—CAVEAT EMPTOR. The rule of *caveat emptor* does not apply, and the vendee may recover damages for fraud in the sale of a shingle mill, where the evidence shows that the vendors employed gross deception to induce the sale, representing that the boiler was in first-class working condition and had never given any trouble, that when the property was inspected the boiler was fired up, and packed with stable manure in order to operate it at all, that it could not then be examined, or subjected to test without considerable expense, and that in fact the boiler had given constant trouble and was unfit for use and dangerous to operate. *Beecher v. Wilson*..... 149

2. VENDOR AND PURCHASER—TITLE—LIS PENDENS—PARTIES TO SUIT—COMMENCEMENT OF ACTION. A *lis pendens* notice does not constitute a lien upon property, entitling the purchaser to rescind the sale, where a prior title was deraigned through a grantee not a party to the action, and it was not shown that the action had been commenced when the notice of *lis pendens* was filed. *Burwell v. Smith*..... 1

3. VENDOR AND PURCHASER—CONTRACT—RESCISSION BY VENDEE. Where the contract for the sale of land did not fix any specific time for delivery of the conveyance, contemplating that the vendor should have a reasonable time therefor, the vendee cannot peremptorily rescind for failure to furnish the deed and recover the purchase money paid without giving notice of his intention to rescind and a reasonable opportunity for the vendor to perform; and a mere demand for a deed is not sufficient. *Skoog v. Columbia Canal Co*.. 115

4. SAME — DELAY IN PERFORMANCE BY VENDOR — REASONABLENESS. Where lots were sold by an irrigation company and fully paid for November 23, 1908, with the understanding that the company was to have a reasonable time to deliver the conveyance with abstract showing good title, and the vendee went into possession and made no demand for a deed until July 23, 1909, a delay until September 28th is not so unreasonable as to permit the vendee at that time to peremptorily rescind the contract, without giving notice of any intention to do so. *Skoog v. Columbia Canal Co*..... 115

5. SAME—TENDER OF DEED—TIME FOR PERFORMANCE. Where a contract for the purchase of land contemplated that the vendor was to have a reasonable time to deliver the deed, and the vendee gave peremptory notice of rescission on the day before action brought, and took the attitude that no tender thereafter would avail, a tender of a deed by bringing the same into court is timely. *Skoog v. Columbia Canal Co*..... 115

6. VENDOR AND PURCHASER—FRAUD—DAMAGES—MEASURE — INTEREST. Upon the sale of a shingle mill through false representations concerning the boiler, which was in fact unfit for use and a loss to the vendee at the time of the sale, the vendee is entitled to offset against

VENDOR AND PURCHASER—CONTINUED.

a note given for the balance of the purchase price the actual damage suffered, with interest from the date of the sale, at the rate prescribed in the note to evidence the indebtedness. *Beecher v. Wilson* 149

VENTILATION:

In coal mines, see MASTER AND SERVANT, 6.

VENUE:

1. VENUE — TRANSITORY ACTION — REFORMATION OF DEED — COURTS — JURISDICTION. An action to reform a deed is transitory, the courts of this state having jurisdiction over the person of the defendant, although the deed was of land in another state. *Rosenbaum v. Evans* 506

VERDICT:

Inadequate or excessive damages, see DAMAGES, 4.
Excessive damages for slander, see LIBEL AND SLANDER, 3.
Special findings in action for injury to servant, see MASTER AND SERVANT, 18.

WAIVER:

Error waived in appellate court, see APPEAL AND ERROR, 23, 24.
Of defect in summons by general appearance, see APPEARANCE.
Of right to object to assessment, see MUNICIPAL CORPORATIONS, 7, 8.
Of right to rescind for breach of warranty, see SALES, 5, 7.
By school district of exemption from assessment for street improvement, see SCHOOLS AND SCHOOL DISTRICTS.

WAREHOUSEMEN:

1. WAREHOUSEMEN—RECEIPTS. An instrument in writing signed by the agent of a warehouseman, describing freight so as to identify it, stating the names of the owners, terms of storage, and promising a delivery upon surrender of the writing, is a warehouse receipt, within Rem. & Bal. Code, § 3369. *Nowell v. Seattle Transfer Co.* 685

2. WAREHOUSEMEN—RECEIPTS — LOSS OF GOODS — DEFENSES — ESTOPPEL. A warehouseman who issued a warehouse receipt in exchange for a railroad delivery order without obtaining possession of the goods, as required by Rem. & Bal. Code, § 3369, cannot evade liability for the loss of the goods, where it retained storage charges for two years, knowing that the goods were lost and never in possession, and not notifying the owners of the loss. *Nowell v. Seattle Transfer Co.* 685

WARNING:

Instructing servant as to dangers of employment, see MASTER AND SERVANT, 11, 12.

WARRANTY:

On sale of goods, see SALES, 2-9.

WATERS AND WATER COURSES:

See NAVIGABLE WATERS.

Effect of partial release on water rights covered by mortgage, see MORTGAGES, 1.

1. WATERS AND WATER COURSES—SURFACE WATERS—FLOODS—PROTECTION AGAINST—LIABILITY. Flood waters overflowing the banks of a stream are surface waters, an outlaw and common enemy, against which a riparian owner may protect itself by turning the same back into the stream; and if a lower proprietor is thereby injured by eddies and currents different from the natural flow of the stream, it is *damnum absque injuria*, for which no recovery can be had. *Harvey v. Northern Pac. R. Co.* 669

2. WATERS AND WATER COURSES — IRRIGATION COMPANIES — REGULATIONS The obligations of an irrigation company in the arid district are *quasi* public, and arbitrary action in the guise of regulations will not be tolerated. *Shafford v. White Bluffs Land and Irr. Co.*... 10

3. SAME—REASONABLENESS OF REGULATIONS. A regulation of an irrigation company providing for an intermittent rather than a constant flow of water cannot be declared unreasonable as a matter of law. *Shafford v. White Bluffs Land and Irr. Co.* 10

4. SAME—WATER CONTRACTS — REGULATIONS — CUSTOM — EFFECT. A water contract permitting an irrigation company to adopt reasonable rules and regulations, is not controlled by a custom in that locality to supply water in a constant rather than an intermittent flow, since the same depends on the irrigator's necessities and beneficial use. *Shafford v. White Bluffs Land and Irr. Co.* 10

5. SAME. A contract giving an irrigation company the right to make reasonable rules and regulations, where the water was furnished by pumping, cannot be controlled by the prevailing custom among users of a natural flow, so long as the company supplied the amount contracted for. *Shafford v. White Bluffs Land and Irr. Co.* 10

6. SAME—WATER CONTRACTS—MUTUALITY — CONSTRUCTION. A water contract providing for a certain amount of water per second of time for each 160 acres of land, subject to reasonable rules and regulations of the company as to the time and manner of delivery, is mutual and to be construed in the light of the necessities of the parties, rather than their arbitrary desires; and a regulation providing for an intermittent flow is not unreasonable, as a matter of law, unless it did not give the amount contracted for. *Shafford v. White Bluffs Land and Irr. Co.* 10

WIDOWS:

Allowance to, see EXECUTORS AND ADMINISTRATORS, 3.

WILLS:

Allowance to widow upon settlement of estate under nonintervention will, see EXECUTORS AND ADMINISTRATORS, 3.

1. WILLS—EXECUTION—UNDUE INFLUENCE — EVIDENCE — SUFFICIENCY. Undue influence upon the part of a son, to whom the testatrix left the major portion of her estate, is not shown, and findings setting aside the will are unwarranted, where it appears that the contestant, a daughter, had been unable to get along with her mother for many years, infrequent visits usually ended in violent discord, while relations with her sons, who took care of her, especially the favored son, were harmonious and usually affectionate; such conduct on his part not being in law undue influence. *Converse v. Mix*..... 318

2. SAME — MENTAL CAPACITY — EVIDENCE — SUFFICIENCY. Mental incapacity of an old lady to make her will is not shown by the fact that she was eccentric in the matter of dress, an ardent woman suffragist, and believed she was being persecuted for her eccentricities, where it appears that she had the business ability and judgment to amass and manage a considerable fortune, and retained her mental faculties until the last. *Converse v. Mix*..... 318

3. WILLS—CAPACITY OF TESTATOR. Incapacity to make a will cannot be established by showing that the testator was frequently under the influence of intoxicants. *Weatherall v. Weatherall*..... 526

4. WILLS — REVOCATION —"WILL"— SUFFICIENCY OF WRITING. Under Rem. & Bal. Code, § 1322, providing that no will in writing shall be revoked except by a subsequent will in writing, a will may be revoked by a writing executed with the solemnity of a will, although the revocation is not a will in the technical sense of making a disposition of any property. *In re Peirce's Estate*..... 437

5. WILLS—PROBATE—PETITION — NECESSITY. Where a will has been filed with the clerk of the court, the court may take proof and probate the will without the filing of any formal petition by an interested party, under Rem. & Bal. Code, §§ 1297, 1288, providing for the immediate probate of wills offered, and that wills filed may be opened and retained for probate. *In re Peirce's Estate*..... 437

WITNESSES:

Opinions, see CRIMINAL LAW, 2.
Conduct in criminal prosecution, see CRIMINAL LAW, 5.
Omission to take oath as harmless error, see CRIMINAL LAW, 12.
Experts, see EVIDENCE, 3, 4.
Perjury, see PERJURY.
Corroboration of female in prosecution for rape, see RAPE.
Credibility of as question for jury, see TRIAL, 3.

WITNESSES—CONTINUED.

1. WITNESSES—CROSS-EXAMINATION — DEVELOPMENT OF DEFENSE. In an action on contract by a railroad company, signed by an authorized agent, it is not proper cross-examination, after the agent has merely identified his signature, for the defendant to develop its defense that the order had been materially altered after it was signed. *Brace v. Northern Pac. R. Co*..... 417

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

WRITINGS:

Parol evidence to vary or explain, see EVIDENCE, 2.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.
Sufficiency of to revoke will, see WILLS, 4.

WRITS:

See ASSISTANCE, WRIT OF; ATTACHMENT; CERTIORARI; MANDAMUS; PROCESS; PROHIBITION.

EXH. 5
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